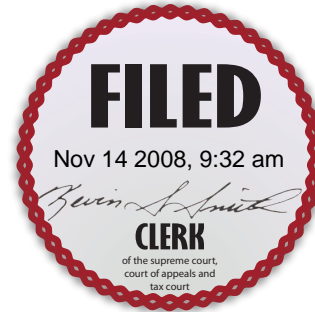


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

FIFTH THIRD BANK, Successor-in-Interest,)
to FIFTH THIRD BANK (SOUTHERN)
INDIANA),)

Appellants,)

vs.)

No. 65A01-0802-CV-81

MOXIE INVESTMENTS AND CONSULTING,)
LLC, MOUNT VERNON FORD-MERCURY,)
LLC, TIMOTHY WADE BUNN a/k/a)
TIM BUNN and RICHARD A. BUNN,)
Appellees.)

APPEAL FROM THE POSEY CIRCUIT COURT
The Honorable James M. Redwine, Judge
Cause No. 65C01-0504-MF-128

November 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Fifth Third Bank (“Fifth Third”) appeals the trial court’s judgment of its claims against Moxie Investments and Consulting, LLC, (“Moxie”), Tim Bunn, Richard Bunn, and Mt. Vernon Ford. We reverse and remand.

Issue

Fifth Third raises two issues, which we consolidate and restate as whether the trial court erroneously found that the Bunns and Moxie did not owe Fifth Third \$65,000 and did not default on a construction loan agreement.

Facts

Tim and Richard Bunn are brothers and the only members of Moxie. Moxie owned and operated four car dealerships in southern Indiana and Illinois—Reo Chevrolet, Reo Ford, Heartland Ford, and Mt. Vernon Ford. Tim was active in the daily operation of the dealerships, while Richard lived in Georgia.

All the Moxie dealerships were financed by Ford Motor Credit Company (“Ford Credit”) with a wholesale line of credit called floor plan financing. Floor plan financing is a unique loan system specifically for the car sales industry. This type of financing uses a wholesale line of credit that allows a dealer to purchase vehicles from the manufacturer for inventory on the dealer’s lot. If the dealer does not timely repay the loan after an individual car has been sold and leaves the lot, the dealer is considered to be in “an out of trust situation.” Tr. p. 7. Ford Credit had a first secured interest in the floor plans as well as capital loans, mortgage loans, and revolving lines of credit for the Moxie dealerships. A

specific cross-collateral default agreement between Ford Credit and Moxie allowed Ford Credit to declare default on all financing obligations of all dealerships if Moxie or any dealership defaulted on any contract with Ford Credit.

Moxie owned a parcel of land in a more desirable location in Mt. Vernon and planned to build a new dealership there. Fifth Third entered into negotiations with Tim to finance the construction of the new facility. Fifth Third would not issue the construction loan without obtaining a floor plan financing arrangement for one of the dealerships. Tim offered the Reo Chevrolet dealership. Fifth Third, however, ultimately was unable to get first priority floor plan financing at Reo Chevrolet because of a commercial loan with first priority in place through Ford Motor Credit.¹

On June 22, 2004, Moxie entered into a construction contract with Hinderliter Construction, LLC, for the construction of the new dealership. On August 27, 2004, Moxie and Fifth Third entered into a loan agreement for \$1.5 million. The agreement encompassed both the real estate construction loan and the floor plan loan. Fifth Third took out a mortgage on the real estate involved to protect its interests. The loan was guaranteed by Mt. Vernon Ford, LLC, and personally guaranteed by both Richard and Tim. Fifth Third advanced approximately \$65,000 to Moxie at closing.

On November 10, 2004, Reo Ford and Reo Chevrolet had overdrawn their Fifth Third checking accounts by \$625,000. Moxie was overdrawn that day by approximately \$300,000. The overdrafts resulted from attempted electronic transfers to Ford Credit. Tim explained to

¹ The parties dispute the duties applicable in assuring Fifth Third a first priority position. Fifth Third contends that Tim Bunn was obligated to arrange a transfer of the loan and release of its priority with

Al Leone at Fifth Third that two dealerships, Reo Chevrolet and Heartland Ford, were out of trust with Ford Credit. Ford Credit notified Moxie and the Bunns on November 12, 2004, that it was exercising its rights under the cross-collateral provision and declaring default on all financing agreements between Ford Credit and the Moxie dealerships. Ford Credit sought immediate repayment of over a million dollars in obligations.

On November 24, 2004, Fifth Third withdrew its floor plan commitment for Reo Chevrolet, pulled the construction loan, and declared itself insecure. Fifth Third explained to Moxie and the Bunns that:

[B]oth the business practices which led to this out of trust situation and the current default status of the Ford Motor Credit floor plans calls into serious question the ability of [Mt. Vernon Ford] to honor its obligations . . . the bank believes that the prospect of payment and performance under the loan is jeopardized.

Exhibit 18. Essentially, Fifth Third was “calling the loan and not proceeding further.” Tr. p. 38. The principal balance outstanding on the construction loan at that time was \$64,114.73.²

Tim Bunn and three Fifth Third bankers had a meeting in early December in an attempt to resolve the situation, but no progress was made.

Meanwhile, Hinderliter had begun construction. Pursuant to a long standing relationship between Hinderliter and Fifth Third, invoices for the Mt. Vernon Ford project were sent directly to Fifth Third. The first invoices sent to Fifth Third totaled \$335,000 and Hinderliter demanded payment on November 24, 2004. Fifth Third refused to pay and

Ford Credit. Tim contends that Fifth Third was to negotiate with Ford Credit directly.

² The trial court consistently used “\$64,000” as the amount at issue. The testimony references both \$64,000 and \$65,000. Because the testimony and exhibit L indicate interest was accruing and Fifth Third

Hinderliter filed suit against it, Moxie, and the Bunns in April of 2005. Fifth Third and Moxie filed cross-claims against each other. Fifth Third claimed that Moxie defaulted on the promissory note, defaulted on the mortgage, and that Mt. Vernon Ford and the Bunns breached their guaranties. Moxie counterclaimed that Fifth Third acted in bad faith, intentionally interfered with a business contract, and caused a loss of significant income from the subsequent failure of the dealerships.

On December 5, 2005, Hinderliter settled its claims with both Fifth Third and Moxie and was dismissed from the litigation. Fifth Third and Moxie filed a joint stipulation with the trial court indicating the same and acknowledging that their claims against each other were not affected by the Hinderliter settlement. The stipulation provided:

The undersigned parties by counsel hereby acknowledge and represent that they have settled their respective litigation as to Hinderliter Construction, LLC in a certain cause of action pending in the Posey Circuit Court under Cause No. 65C01-0504-MF-00128.

The parties further acknowledge and represent that Moxie, et al., and Fifth Third have not settled their respective cross-claims against each other, and that neither party relinquishes any or all claims, defenses or legal positions which they may have against each other as a result of their respective settlements with Hinderliter Construction, LLC and shall retain such claims, defenses and legal positions as if such settlements had not occurred. The fact of such settlements shall not be admissible in any further proceedings in this cause.

App. p. 211. The trial court entered an order dismissing Hinderliter.

does not point us to a specific dollar amount, we will use \$65,000.

A two-day bench trial on the remaining claims between Fifth Third, Moxie, and the Bunns began on August 21, 2007.³ The trial court held that Fifth Third did not meet its burden of proof regarding the \$65,000 and that the Bunns did not default. The trial court held that the Bunns did not meet their burden of proof to prove Fifth Third acted negligently or in bad faith. The trial court did not award damages to either party. Fifth Third filed a motion to correct error, which was denied, contending that the trial court wrongfully considered the settlement with Hinderliter and ignored the joint stipulation in reaching its findings and conclusions. This appeal followed.

Analysis

We first note that Moxie did not file an appellee's brief. Under such circumstances, we need not undertake the appellee's burden of responding to arguments that are advanced for reversal by the appellant. Griffin v. Griffin, 872 N.E.2d 653, 656 (Ind. Ct. App. 2007). Instead, we may reverse the trial court if the appellant makes a prima facie case of error. Id. "Prima facie" is described as at first sight, on first appearance, or on the face of it. Id.

Fifth Third alleges that the trial court's findings and conclusions are clearly erroneous. Neither party made a specific motion under Indiana Trial Rule 52 prior to the admission of evidence requesting findings of fact and stated conclusions. If a trial court enters specific findings of fact and conclusions sua sponte, we apply the following two-tiered standard of review: whether the evidence supports the findings, and whether the

³ No opening and closing statements were made at the bench trial and the main contentions of the parties were apparently outlined and submitted in trial briefs. The briefs are not part of the record on appeal.

findings support the judgment. Fowler v. Perry, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005).

The trial court's findings and conclusions will be set aside only if they are clearly erroneous, meaning the record contains no facts or inferences supporting them. Id. "A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made." Id. "We neither reweigh the evidence nor assess the credibility of witnesses, but consider only the evidence most favorable to the judgment." Id. We emphasize that sua sponte findings control only as to the issues they cover, and a general judgment standard will control as to the issues upon which there are no findings. Id. We will affirm a general judgment entered with findings if it can be sustained on any legal theory supported by the evidence. Id.

Fifth Third specifically contends that four findings are unsupported by the evidence. First, "Richard Bunn is a practicing attorney who signed off on the settlement. He testified that he believed the \$64,000.00 was included in the incentives to the settlement." App. p. 17. Although Richard did testify to this belief, in a follow-up comment Richard acknowledged, "evidently that is not the case." Tr. p. 204. In light of the signed stipulation stating that Fifth Third retained all of its "claims, defenses and legal positions as if such settlements had not occurred" Richard's opinion and testimony to the contrary is irrelevant. App. p. 211. This finding is unsupported by the evidence and clearly erroneous.

The second finding alleged by Fifth Third to be problematic is: "Tim Bunn is an experienced business person who testified he believed the \$64,000.00 was part of the

settlement.” App. p. 17. Fifth Third points out, and our review of the record confirms, that Tim made no references to the Hinderliter settlement during his trial testimony. We note, however, that the record reveals a transcript of Tim’s deposition was submitted at trial and that deposition is not included here. Regardless of when, if at all, Tim may have made such a remark, the stipulation renders his testimony irrelevant. This finding is unsupported by the evidence—it is based on irrelevant, contrary, and possibly non-existent testimony.

The third finding alleged by Fifth Third to be problematic is: “Bank presented no evidence about the settlement except to claim the \$64,000.00 had not been re-paid.” Id. Fifth Third admits they presented no evidence of the settlement, but claims that in light of the stipulation, they had no burden to do so. We agree. This finding is irrelevant.

The fourth and final finding that Fifth Third contends is in error is: “Bunns held Bank responsible for the Bunns loss of real estate. It is not probable that Bunns would help Bank settle with Hinderliter if Bunns still owed Bank.” Id. Fifth Third argues that the trial court makes an improper and unsupported inference regarding the Bunns’ motivations for settling with Hinderliter. We agree and there is nothing in the record that explains or supports why Moxie and the Bunns settled with Hinderliter. Any speculation of the trial court regarding the parties’ motivations to settle is unsupported and irrelevant. Moreover, the signed stipulation explicitly preserved Fifth Third’s claims and explicitly excluded all mentions of the settlement with Hinderliter from the ongoing litigation. This finding is unsupported by the evidence and clearly erroneous.

Al Leone testified that Fifth Third advanced \$65,000 to Moxie and it was not paid back. Exhibit L, a Fifth Third form submitted by the Bunns at trial, indicated that \$65,000 had been drawn on the loan and was outstanding. Upon mention of the \$65,000 advance, neither Tim nor Richard disputed the existence of the cash advance. Moxie and the Bunns presented no evidence that this \$65,000 advance had been repaid. The trial court's findings to the contrary are unsupported by the evidence. Ultimately, the trial court concluded that "the Bunns did not default on the contract such as to still owe Bank" and "Bank is not entitled to claim its attorney fees and costs." Id. These conclusions are clearly erroneous.

It is clear from the plain language of the loan agreement that Moxie did default. The loan agreement sets out twelve instances that can be deemed a default at the option of the holder. Considering Moxie's out of trust situation with Ford Credit for nearly a million dollars, it is obvious that Fifth Third became a "holder, in good faith, [who] believes the prospect of payment or performance is impaired." Exhibit 1. Moxie presented no evidence to refute the circumstances outlined by Fifth Third as its basis for declaring default. Thus, the trial court improperly concluded that Moxie was not in default.

Fifth Third only has to present prima facie evidence of error in order to succeed on appeal and has done so here. Fifth Third pointed to four clearly unsupported and erroneous factual findings of the trial court regarding the \$65,000 cash advance. Fifth Third also pointed to the clear evidence of Moxie's default of the loan agreement.

Also, the loan agreement clearly states that Fifth Third is entitled attorney fees in the event of default. As for an award of attorney fees, we remand for the trial court to calculate an appropriate amount.

Conclusion

Several of the trial court's findings were unsupported by the evidence. The evidence supports a conclusion that the cash advance of \$65,000 from Fifth Third to Moxie was outstanding at the time of litigation and is due. The evidence also supports a conclusion that Moxie defaulted on its loan agreement with Fifth Third. We reverse as to these two issues and remand for a calculation of Fifth Third's attorney fees.

Reversed and remanded.

FRIEDLANDER, J., and DARDEN, J., concur.