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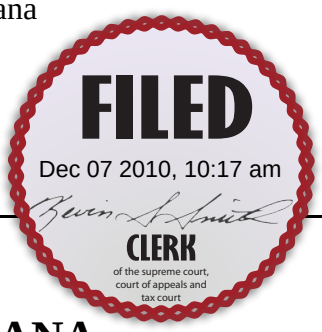

IN THE
COURT OF APPEALS OF INDIANA

CAROL LONG-SWITALSKI,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-1004-CC-270
	)	
WENDELINE SWITALSKI,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH CIRCUIT COURT
The Honorable Michael G. Gotsch, Judge
Cause No. 71C01-0707-CC-1188

December 7, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Carol Long-Switalski ("Carol") and Wendeline Switalski ("Wendeline") were divorced on February 3, 2006, in Missouri. Carol received a home in Walkerton, Indiana, as her separate property and was ordered to pay Wendeline $46,000 to equalize the property distribution. Carol's obligation was evidenced by a promissory note, the terms of which were modified by a later agreement. On July 18, 2007, Wendeline filed suit against Carol, alleging that she had defaulted on the note, that she had failed to return personal property belonging to him, and that she had made unauthorized charges on his credit card. The trial court found that Carol was in default on the note and ordered her to pay the balance with interest. The court also found that she had made unauthorized charges on Wendeline's credit card. However, the court did not award Wendeline any additional personal property.

Carol now appeals. She argues that, pursuant to the terms of the agreement that modified the note, the trial court should have dismissed this lawsuit. We conclude that Carol has waived this issue and that it is without merit at any rate. Carol also challenges the amount that the trial court found that she owed to Wendeline for unauthorized charges. Wendeline testified that he allowed Carol to use his card for fuel and food when traveling between Indiana and Missouri. Some of the charges included in the trial court's total appear to be charges from restaurants, gas stations, and convenience stores. As the evidence does not support a conclusion that these charges were unauthorized, we remand for the trial court to recalculate the amount that Carol owes for unauthorized charges. Therefore, we affirm in part, reverse in part, and remand.

Facts and Procedural History

On December 21, 2005, Wendeline and Carol entered a "Marital Settlement and Separation Agreement," which the circuit court of Jackson County, Missouri, reduced to an order on February 3, 2006. Plaintiff's Ex. 3. Pursuant to the settlement agreement, Carol received a home in Walkerton, Indiana. In order to equalize the division of property, Carol agreed to pay Wendeline $46,000. Carol's obligation was evidenced by a promissory note. The note required Carol to pay the $46,000 within a year of the dissolution. No interest was to accrue unless she defaulted; in that case, the interest rate was set at 5.5%.

For a time, Wendeline and Carol continued to live together and commingled assets to some extent. Wendeline allowed Carol to use his Visa credit card for gas and food when traveling between their properties in Missouri and Indiana.

Shortly before the note became due, the parties orally agreed that Carol could pay off the note by making monthly payments of $500 until August 2009, when she would pay the remaining balance, including interest. The parties later reduced this agreement to writing in a document that was notarized on August 12, 2008. Carol began making the monthly payments in March 2007 and continued to make payments through October 2008. Carol failed to make the payments in November and December of 2008, and thereafter, she made only four more payments.

Meanwhile, on July 18, 2007, Wendeline filed suit against Carol. Count 1 alleged that Carol had failed to pay the note, count 2 alleged that Carol had failed to return personal property belonging to Wendeline, and count 3 alleged that Carol had made unauthorized

charges on Wendeline's credit card. The case was tried on September 22, 2009. Wendeline entered into evidence a list of items that he believed Carol should return to him, the settlement agreement, the promissory note, documentation of the payments that Carol had made on the note, and his credit card statements. Wendeline testified that he allowed Carol to use his credit card for travel between Missouri and Indiana: "She used it just for transportation, to and from transit. If she needed fuel or get a bit to eat rather than carry cash on her." Tr. at 20. He testified that he did not give her permission to use his credit card for any other purpose. On his statements, Wendeline marked the items that he believed he had not authorized. The value of those items totaled $11,882.40.

Carol entered into evidence the agreement that modified the promissory note. Although she testified concerning the reason that she had struggled to pay off the note, she did not dispute the amount that Wendeline claimed that she owed. Carol denied that she made unauthorized charges on Wendeline's credit card and claimed that they commingled funds freely.

The trial court issued its judgment on March 5, 2010. The trial court found that the agreement modifying the note was valid. Pursuant to the modification agreement, the note was due no later than August 2009; therefore, the court found that Carol was in default and ordered her to pay the remaining balance with interest. The court also found that Carol had made unauthorized charges on Wendeline's credit card in the amount of $11,882.40, but

found that Wendeline was not entitled to any additional personal property.[1] Carol now appeals.

Discussion and Decision

I. Dismissal

Carol argues that the terms of the agreement modifying the note required the trial court to dismiss this lawsuit. Wendeline correctly notes that Carol did not raise that issue in the trial court; therefore, it is waived. *See Cavens v. Zaberdac*, 849 N.E.2d 526, 533 (Ind. 2006) ("Issues not raised at the trial court are waived on appeal.").

At any rate, we find Carol's argument unpersuasive. Carol relies on paragraph six of the agreement:

> Wendeline Switalski verifies that this agreement is a written form of the agreement He and Carol made verbally in January of 2007 and that no litigation was or is necessary for Carol to fulfill her obligation of the promissory note and swears to forego/cancel this law suit and any future law suit as a means to collect said promissory note.

Appellant's App. at 21. We agree with Wendeline that the only reasonable interpretation of this paragraph was that Wendeline gave up the right to sue on the terms of the original note, not that he gave up the right to sue if Carol failed to fulfill the terms of the modification agreement. At the time that they entered into the modification agreement, Carol was making the monthly payments; however, the time for performance under the terms of the modification agreement has now passed and Carol still owes approximately $40,000.00. In

[1] In paragraph nine of the order, the trial court found that Carol made "no less than the sum of $11,882.40" in unauthorized charges, but ultimately ordered her to pay $11,589.40. *Compare* Appellant's App. at 4 with *id*. at 5. As we are remanding for the court to recalculate the amount that Carol owes for unauthorized charges, this discrepancy is irrelevant.

fact, Carol does not dispute that she owes Wendeline the money. Carol's claim that Wendeline may not sue for her default on the modification agreement would render the modification agreement meaningless, because Wendeline would be helpless to enforce Carol's obligation. *See Peoples Bank & Trust Co. v. Price*, 714 N.E.2d 712, 717 (Ind. Ct. App. 1999) ("The court will make all attempts to construe the language in a contract so as not to render any words, phrases, or terms ineffective or meaningless."), *trans. denied*; *Gehlbach v. Hawkins*, 654 N.E.2d 877, 880 (Ind. Ct. App. 1995) (declining to adopt an interpretation of a contract that would render an option to purchase an illusory promise). Finally, paragraph six does not purport to limit Wendeline's ability to sue on unrelated issues, and we find without merit her claim that it bars Wendeline's suit to recover the unauthorized charges on his credit card.

II. Unauthorized Charges

The trial court entered findings of fact and conclusions thereon. *See* Ind. Trial Rule 52. Therefore we apply a two-tiered standard of review: whether the evidence supports the findings, and whether the findings support the judgment. *Khaja v. Khan*, 902 N.E.2d 857, 866 (Ind. Ct. App. 2009).

> The trial court's findings and conclusions will be set aside only if they are clearly erroneous, i.e., when the record contains no facts or inferences supporting them. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. We neither reweigh the evidence nor assess the credibility of witnesses, but consider only the evidence most favorable to the judgment.

Id. (quoting *Fowler v. Perry*, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005)).

Carol argues that the evidence does not support a finding that she made unauthorized charges because Wendeline could not remember with sufficient clarity what charges he authorized. Carol is inviting us to reweigh witness credibility, which we will not do. *See id.*

One of the disputed charges was a charge of $7180.14, which was used to pay off a Lowe's charge card. Carol argues that this was not an unauthorized charge because the Lowe's charge card was in Wendeline's name. However, the record reflects that the divorce decree required Carol to pay $9870 toward the Lowe's debt, whereas Wendeline's portion of that debt was only $600. Therefore, the record supports an inference that Carol used Wendeline's Visa to pay part of her share of the Lowe's debt, which Wendeline did not authorize.

While the record supports a conclusion that Carol made some unauthorized charges, we note that Wendeline testified that he allowed Carol to use his credit card for fuel and food while traveling. Nevertheless, some of the items that Wendeline indicated were unauthorized appear to be from restaurants, gas stations, and convenience stores. Wendeline did not explain why he included these charges in his list of unauthorized charges when he freely admitted that he had allowed Carol to use the card for food and fuel. As the plaintiff, Wendeline had the burden to prove by a preponderance of the evidence that the charges were unauthorized. *See Hopper Resources, Inc. v. Webster*, 878 N.E.2d 418, 423 (Ind. Ct. App. 2007) (plaintiff in a civil case must establish its claim by a preponderance of the evidence), *trans. denied*. Therefore, we reverse and remand for the trial court to recalculate

Wendeline's damages, excluding charges from restaurants, gas stations, and convenience stores.

Affirmed in part, reversed in part, and remanded.

KIRSCH, J., and BRADFORD, J., concur.