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IN THE
COURT OF APPEALS OF INDIANA

KURT W. TAUER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 32A01-0602-CV-62
	)	
HENDRICKS COUNTY BANK AND TRUST COMPANY,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable David H. Coleman, Judge
Cause No. 32D02-0302-MF-26

October 31, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Dr. Kurt Tauer appeals from the trial court's judgment following a bench trial finding him liable as a guarantor on two loans taken out by RHI, an Indiana limited liability company. Dr. Tauer argues that he should not be found liable because the guaranty was signed by his brother, Eric Tauer, without Dr. Tauer's authorization, that the document could not have been ratified, and that he is not estopped from challenging the document's validity. Holding that the evidence supports the trial court's finding that Dr. Tauer authorized Eric to sign the personal guaranty, we affirm.

Facts and Procedural History

Dr. Tauer is an oncologist practicing in Tennessee. He is also the president of the clinic at which he works and handles various business affairs of the clinic. Eric resides in Indiana, and has been active in the development of real estate in Hendricks County, Indiana, since the mid-1990s. Dr. Tauer first conducted business with Hendricks County Bank and Trust Company ("HCBT"), in 1995, when he took out a personal loan for the purchase of land. Between 1995 and 1999, Dr. Tauer received from HCBT several more loans, all of which he repaid. Eric began his banking relationship with HCBT around 1994, when Stephen Kaiser, with whom Eric had a previous business relationship, began working at HCBT. When Dr. Tauer was visiting Eric sometime around 1999, Dr. Tauer met Kaiser and told him that he had "absolutely no problem" with Eric representing him in regards to investment properties. Transcript at 14.

At some point in the late 1990s, the brothers formed RHI for the purpose of

developing commercial property in Indiana.[1] In 1999, RHI began its relationship with HCBT, taking out a loan of $450,000 (the "1999 Loan"). Eric signed Dr. Tauer's name, as a member of RHI, to the promissory note and mortgage related to this loan. In 2000, HCBT sent Dr. Tauer a letter (the "Audit Letter") requesting that he "verify the validity and accuracy of the attached loan documents which were executed with your business and signed by you." Appellant's Appendix at 112. Even though Dr. Tauer had not actually signed the attached loan documents, Dr. Tauer signed and returned the letter. The 1999 Loan was paid in full.

In 2001, RHI took out a second loan from HCBT (the "2001 Loan"). In conjunction with this loan, Eric signed Dr. Tauer's name to a personal guaranty as well as a promissory note and a mortgage. This personal guaranty applied to the 2001 Loan as well as future loans to RHI. The 2001 Loan was restructured in February 2002, and Eric signed Dr. Tauer's name to a renewal note setting the principal amount at $581,250 and extending the maturity date to August 2002. In August 2002, HCBT prepared another renewal note (the "Renewal Note") for RHI and forwarded the note directly to Dr. Tauer. The Renewal Note specifically referenced "a personal guaranty from Kurt W. Tauer dated February 6, 2001." Appellant's App. at 120. Dr. Tauer signed the Renewal Note and returned it to HCBT. The 2001 Loan was not repaid, and is the subject of Count I of HCBT's complaint.

[1] Dr. Tauer argues that he is not a member of RHI and that the trial court's finding that he is a member is clearly erroneous. We hold that clear and convincing evidence, including several documents that Dr. Tauer signed as a member of RHI, supports the trial court's finding.

On May 1, 2002, RHI took out another loan from HCBT (the "2002 Loan"). Eric again signed Dr. Tauer's name to the promissory note and mortgage. The 2002 Loan was not repaid, and is the subject of Count II of HCBT's complaint.

On May 28, 2002, Dr. Tauer executed a power of attorney (the "POA"), at the request of First Indiana Bank. The POA authorized Eric to sign Dr. Tauer's name, as a member of RHI, on documents relating to real estate transactions.

In October 2002, the 2001 and 2002 Loans went into default. Eric has since filed a Chapter 11 petition, and has been indicted for criminal activity. HCBT filed its complaint in this case in February 2003, claiming that Dr. Tauer is liable for RHI's balance pursuant to the personal guaranty.

At trial, in addition to the documents identified above, evidence was introduced through the testimony of Dr. Tauer, Kaiser, and a Forensic Document Examiner, who testified regarding the authenticity of signatures on the documents. Eric refused to testify regarding any material issue, asserting his Fifth Amendment privilege against self-incrimination. After a bench trial, the trial court signed and adopted HCBT's proposed findings of fact and conclusions of law verbatim. In its findings of fact, the trial court found that Eric's making of Dr. Tauer's signature on the personal guaranty "was authorized and ratified by Dr. Tauer pursuant to the POA." Appellant's App. at 4. The trial court also found that "[t]his signature was also authorized and ratified by Dr. Tauer pursuant to the course of conduct between Dr. Tauer and his brother." Id. In its conclusions of law, the trial court concluded that Dr. Tauer had ratified Eric's actions by signing the Renewal Note and the POA and that Dr. Tauer was estopped from denying the validity of his signature on the

personal guaranty. The trial court entered a judgment finding Dr. Tauer liable for the 2001 and 2002 Loans pursuant to this personal guaranty. Dr. Tauer now appeals.

Discussion and Decision

I. Standard of Review

As in this case, when a party has requested findings of fact and conclusions of law, we will affirm the trial court's judgment on any legal theory supported by the findings. Wenzel v. Hopper & Galliher, P.C., 779 N.E.2d 30, 36 (Ind. Ct. App. 2002), trans. denied. In reviewing the trial court's judgment, we apply the following two-tiered standard of review: (1) we determine whether the evidence supports the findings, and (2) we determine whether the findings support the judgment. Sullivan Builders & Design, Inc. v. Home Lumber of New Haven, Inc., 834 N.E.2d 129, 134 (Ind. Ct. App. 2005), trans. denied. We will set aside the trial court's findings only if they are clearly erroneous. Id. We will conclude that a finding is clearly erroneous only if no facts in the record support the finding either directly or by inference. Id. We cannot reweigh the evidence, will consider the evidence most favorable to the judgment, and will draw all reasonable inferences in favor of the judgment. Id.

Dr. Tauer argues that we should not apply this standard of review, and instead give less deference to the trial court's judgment through a de novo review. In support, Dr. Tauer presents three arguments, which we address in turn.

First, Dr. Tauer argues that the outcome of this case depends primarily on the interpretation of legal documents, which we are in an equally good position as the trial court to interpret. We agree that we need not give deference to a trial court's judgment when the

only evidence submitted is documentary. Indianapolis Convention & Visitors Ass'n, Inc. v. Indianapolis Newspapers, Inc., 577 N.E.2d 208, 211 (Ind. 1991). However, every case involving documents does not warrant de novo review. When, as in this case, "the trial court has heard the evidence and has had the opportunity to judge the credibility of witnesses, we will not set aside the findings of the trial court unless they are clearly erroneous." Id. Although this case does involve documents, the trial court also heard the testimony of three witnesses and had the opportunity to observe them and judge their credibility. Contrary to Dr. Tauer's argument, we conclude that this testimony played a significant role in the trial court's findings. The documentary evidence in this case does not alter our standard of review.

Second, Dr. Tauer argues that because the trial court adopted HCBT's proposed findings of fact and conclusions of law verbatim, we should give less deference to the trial court's findings. When a trial court merely adopts a party's findings, we have less "confidence as an appellate court that the findings are the result of considered judgment by the trial court." Cook v. Whitsell-Sherman, 796 N.E.2d 271, 273 n.1 (Ind. 2003). And when the trial court merely signs a party's proposed findings, we inevitably have even less confidence that it has reviewed and considered each finding. See id. (appellate court had "an even lower level of confidence" when trial court had adopted a party's findings by a one-line order). Also, if we find errors in the findings adopted by trial court,[2] we are particularly troubled. Parish v. State, 838 N.E.2d 495, 498 n.3 (Ind. Ct. App. 2005). Nonetheless, we recognize the tremendous workload of our trial courts and that our supreme court has

expressly authorized the practice of adopting a party's findings verbatim. Prowell v. State, 741 N.E.2d 704, 708-09 (Ind. 2001). Despite the lower level of confidence with which we view the trial court's findings, and "although we by no means encourage the wholesale adoption of a party's proposed findings and conclusions, the critical inquiry is whether such findings, as adopted by the court, are clearly erroneous." In re Marriage of Nickels, 834 N.E.2d 1091, 1096 (Ind. Ct. App. 2005).

Third, Dr. Tauer argues that the issue of whether a forged document can be ratified is a question of law, which we review de novo. We agree that whether a forged document can be ratified is a question of law. However, we do not reach the question of whether a forged document can be ratified because we base our holding on the trial court's finding that Dr. Tauer authorized Eric to sign the personal guaranty. The existence of an agency relationship and the scope of an agent's authority is a question of fact. Zimmerman v. McColley, 826 N.E.2d 71, 79 (Ind. Ct. App. 2005).

We decline to conduct de novo review and proceed to address Dr. Tauer's liability under the personal guaranty using our usual standard of review for cases in which the trial court has issued findings of fact and conclusions of law.

II. Eric's Authorization to Sign Dr. Tauer's Name to the Personal Guaranty

The authorization created through an agency relationship "results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, and consent by the other so to act." Mullen v. Cogdell, 643 N.E.2d 390, 398 (Ind.

[2] As discussed below, we do find one of the trial court's findings of fact to be clearly erroneous.

Ct. App. 1994), trans. denied. An agent's act will bind the principal only if the agent had authority to bind him. Heritage Dev. of Indiana, Inc. v. Opportunity Options, Inc. 773 N.E.2d 881, 888 (Ind. Ct. App. 2002), trans. dismissed. A principal gives an agent actual authority through "written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." Scott v. Randle, 697 N.E.2d 60, 66 (Ind. Ct. App. 1998), trans. denied. This relationship may be created by implication and may be demonstrated by circumstantial evidence. Heritage Dev. of Indiana, Inc., 773 N.E.2d at 889.

In its findings of fact, the trial court found that Dr. Tauer authorized Eric to sign his name to the personal guaranty pursuant to the POA and through the course of conduct between Dr. Tauer and Eric. Although we hold that the POA did not, in itself, authorize Eric to sign Dr. Tauer's name, we hold that the trial court's finding of authorization pursuant to the course of conduct between the brothers is not clearly erroneous. We further hold that this finding is sufficient to support the trial court's judgment.

1. The POA

Initially, we note that regardless of its terms, the POA could not have given Eric the authority to sign the personal guaranty because Dr. Tauer had not executed the POA when Eric signed the personal guaranty, and therefore it could not have caused Eric to believe that he had the authority to bind Dr. Tauer. See Scott, 697 N.E.2d at 66. Moreover, even if the POA had been in existence when Eric signed the personal guaranty, the terms of the POA fail to give Eric the authorization to sign a personal guaranty. The POA states in relevant part:

> I, Kurt Tauer, as a member of RHI, LLC, … do hereby designate Eric Tauer … as my true and lawful attorney in fact.
> ***
> The above named attorney in fact shall have authority to sign my name on my behalf as a member of the LLC, with respect to real property transactions … and shall be construed so as to effectuate this purpose. The undersigned ratifies, reaffirms and acknowledges the validity of his signature by Eric Tauer on all Deeds and Mortgages (as hereinafter defined) executed prior to the execution of this power of attorney.
> ***
> The undersigned ratifies, reaffirms and acknowledges that Eric Tauer is and has been authorized to execute resolutions of the LLC for the benefit of the LLC and/or on behalf of the undersigned. The undersigned ratifies, reaffirms and acknowledges that Eric Tauer is and has been authorized to execute any and all Deeds and Mortgages and any other contracts pertaining to the Real Estate.

Appellant's App. at 122 (emphasis added).

No terms of the POA give Eric authorization to sign Dr. Tauer's name to a personal guaranty. The POA authorizes Eric to sign Dr. Tauer's name "as a member of the LLC," but Eric did not sign the personal guaranty in Dr. Tauer's name as a member of RHI. He signed it in Dr. Tauer's name as an individual. The POA also indicates that Eric has authorization to sign "all resolutions of the LLC . . . on behalf of the undersigned."[3] The personal guaranty, however, is not a resolution of the LLC; it is personal to Dr. Tauer.

The trial court's finding that the POA authorized[4] Eric to sign Dr. Tauer's name to the personal guaranty is clearly erroneous as it is not supported by the evidence or any reasonable inferences made from the evidence.

[3] We note that this sentence cannot logically be read as "all resolutions . . . on behalf of the undersigned," as such a sweeping grant of authority would not be consistent with the POA's other terms, which limit the POA to RHI's purchase of real estate within certain geographic limits, and in no way indicate any intent to grant Eric a general power of attorney.

[4] We express no opinion as to whether the POA ratified Eric's act of signing Dr. Tauer's name.

2. Course of Conduct

The trial court found that the course of conduct between Dr. Tauer and Eric authorized Eric to sign Dr. Tauer's name to the personal guaranty. Sufficient evidence exists to support this finding.

Kaiser testified that when he asked Dr. Tauer "if he was comfortable with Eric . . . representing him . . . finding investment properties for him," Dr. Tauer told Kaiser that he had "absolutely no problem with Eric doing that." Tr. at 14. Dr. Tauer argues that this statement is irrelevant. We disagree, and find it indicative of the business relationship between Dr. Tauer and Eric, especially as Dr. Tauer made the statement to a representative of the bank that handled loans extended to RHI.

Dr. Tauer provided his personal tax and financial information to Eric on a yearly basis. Dr. Tauer testified that he did so in connection with loans associated with his mother's home and some other commercial properties. The trial court could have reasonably considered this evidence as indicating that the general course of conduct between Dr. Tauer and Eric contemplated Eric having authority to complete transactions, such as a personal guaranty, for which he would need access to information relating to Dr. Tauer's personal finances.

Documentary evidence also supports the inference that Dr. Tauer authorized Eric to sign the personal guarantee. Dr. Tauer signed the Audit Letter verifying the validity of his signature, which was in fact made by Eric, on the loan documents associated with the 1999 Loan. Although the 1999 Loan did not require a personal guaranty, Dr. Tauer's authentication of his signature is evidence from which the trial court could infer that Dr.

Tauer had given Eric authorization to sign Dr. Tauer's name to financial documents associated with RHI's real estate business.

Dr. Tauer executed the POA, which gave Eric authorization to sign Dr. Tauer's name as a member of RHI for certain real estate transactions. Although Dr. Tauer signed the POA after Eric signed the personal guaranty, and thus it could not have authorized Eric to sign Dr. Tauer's name to the guaranty, the POA provides circumstantial evidence of Eric's authority to sign Dr. Tauer's name to RHI documents, and of the general business relationship between Dr. Tauer and Eric.

Most importantly, Dr. Tauer signed the Renewal Note referencing the personal guaranty without raising any objection. This document is certainly circumstantial evidence indicating that Dr. Tauer had previously given Eric authorization to sign the personal guaranty. See Heritage Dev. of Indiana, Inc., 773 N.E.2d at 889 (where one co-owner signed purchase agreement binding all other owners, and non-signing owners subsequently executed a document indicating that they had entered into the purchase agreement, this document was evidence that the non-signing co-owners had authorized the co-owner to bind them to the purchase agreement).

Dr. Tauer argues that the trial court should have inferred from Eric's assertion of his Fifth Amendment right against self-incrimination that Eric was not authorized to sign Dr. Tauer's name. Indiana courts allow the trier of fact in a civil case to draw adverse inferences from a witness's refusal to testify. Gash v. Kohm, 476 N.E.2d 910, 913 (Ind. Ct. App. 1985), trans. denied. However, that the trier of fact may draw an adverse inference from a witness's refusal to testify does not mean that the trier of fact is required to draw any specific

inference. Indeed, a party could raise the Fifth Amendment for many different reasons, and the assertion of this right often gives rise to many reasonable inferences. While the trial court could have inferred from Eric's refusal to answer questions that Dr. Tauer had not given him permission to sign Dr. Tauer's name to the personal guaranty, the trial court also could have reasonably inferred that Eric did not want to admit in his deposition that Dr. Tauer had authorized the signature, and thereby subject his brother to significant civil liability. Cf. U.S. ex rel. DRC, Inc. v. Custer Battles, LLC, 415 F.Supp.2d 628, 635 (E. D. Va. 2006) (addressing argument that witness asserted Fifth Amendment right not out of fear of prosecution, but out of desire to harm defendants through adverse inferences arising from witness's silence). The trial court's failure to infer lack of authorization from Eric's refusal to testify was not error.

Dr. Tauer testified that he was not aware of RHI's existence until October 2002, (after the execution of all relevant documents) and signed all documents Eric sent him without reviewing them because he trusted Eric. He also testified that he never gave Eric the authority to sign his name to documents or to enter into a personal guaranty. The trial court, however, did not give significant credit to Dr. Tauer's testimony. Finding of Fact 38 states:

> Dr Tauer is not a credible witness because:
>
> a. He lied when he testified that he did not know about RHI until October 2002. The written evidence shows that in March 2000, he signed and returned to the Bank an audit letter which verified the genuineness of certain RHI loan documents.
>
> b. He lied when he testified that he never allowed Eric to use his name. The written evidence shows that Dr. Tauer signed a power of attorney which specifically allowed Eric to sign Dr. Tauer's name.

c. Dr. Tauer's testimony is incredulous in that a person of his education and sophistication would sign, without reading, a promissory note for over one-half million dollars.

Tr. at 30.

It is the trial court's province to assess the credibility of witnesses and weigh the evidence. It clearly found Dr. Tauer an unreliable witness and viewed the circumstantial evidence indicating that Dr. Tauer had authorized Eric to sign the personal guaranty as more persuasive than Dr. Tauer's testimony indicating that he did not. We will neither reassess Dr. Tauer's credibility nor reweigh the evidence on appeal. It is enough for our holding for us to conclude that sufficient evidence supports the trial court's finding that Dr. Tauer authorized Eric to sign the personal guaranty.

Conclusion

We hold that the evidence introduced at trial supports the trial court's finding that Dr. Tauer authorized Eric to sign Dr. Tauer's name to the personal guaranty pursuant to the course of conduct between the two. We further hold that this finding supports the trial court's judgment finding Dr. Tauer liable for the loans made to RHI.

Affirmed.

SULLIVAN, J., and BARNES, J., concur.