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IN THE
COURT OF APPEALS OF INDIANA

TERRY DITTRICH CHRYSLER-JEEP, INC., SIMON INVESTMENTS, LLC, TERRY DITTRICH and DAWN DITTRICH,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 45A03-0607-CV-303
MERCANTILE NATIONAL BANK OF INDIANA,	)	
Appellee-Defendant.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable James J. Richards, Senior Judge
Cause No. 45D01-0408-PL-97

October 26, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellants-Plaintiffs Terry Dittrich Chrysler-Jeep, Inc. ("Dittrich Chrysler-Jeep"), Simon Investments, LLC ("Simon Investments"), Terry Dittrich ("Terry"), and Dawn Dittrich ("Dawn" and collectively "Appellants-Plaintiffs") appeal from the grant of summary judgment in favor of Mercantile National Bank of Indiana ("Mercantile"). We affirm in part, reverse in part, and remand.

Issue

The Appellants-Plaintiffs raise one issue of whether the trial court erred in granting summary judgment to Mercantile.

Facts and Procedural History

On January 10, 1997, Mercantile extended to Dittrich Chrysler-Jeep a $3,000,000 line of credit. Terry was the president of Dittrich Chrysler-Jeep, but he also personally guaranteed the loan along with his wife, Dawn. Dittrich Chrysler-Jeep used this line of credit as floor financing[1] to operate its automobile dealership in Hammond, Indiana. Mercantile later renewed and increased the credit line, pursuant to the request of Dittrich Chrysler-Jeep, to $4,000,000. Terry and Dawn also co-own Simon Investments, which at the time owned the land on which the dealership was located. The loan from Mercantile was secured by the dealership land, owned by Simon Investments, and by all of the business assets of Dittrich Chrysler-Jeep, including the car inventory.

In September 2003, by way of a floor plan inspection, Mercantile discovered that

[1] This type of financing, typically used by car dealerships, allows the dealers to finance their floor stock of cars available for sale. The lender maintains legal ownership of the vehicles while the car dealer displays

Dittrich Chrysler-Jeep failed to report $1,482,518 in cars sold. Terry acknowledged that this caused serious shortfall in Mercantile's collateral and constituted default under the loan. In lieu of a foreclosure sale, the assets of Dittrich Chrysler-Jeep were sold to Northlake Chrysler-Jeep pursuant to an Asset Purchase Agreement ("Asset Agreement") dated December 26, 2003. This document included the following "hold harmless" clause (the "hold harmless provision"):

> SELLER also agrees to hold harmless Mercantile National Bank of Indiana, for its assistance and participation in this Agreement and any and all activities related thereto.

Appellants' Appendix at 44. "Seller" is earlier defined in the agreement as Terry Dittrich Chrysler-Jeep, Inc. Terry, as president of Dittrich Chrysler-Jeep, and Ronald Morris, president of Northlake Chrysler-Jeep, signed the Asset Agreement.

On March 1, 2004, Mercantile executed a Release of All Obligations, Liabilities and Debts (the "Release") in favor of Dittrich Chrysler-Jeep, Terry, Dawn, and Simon Investments**.** The Release provided:

> [T]he undersigned, MERCANTILE NATIONAL BANK, for good and valuable consideration provided to the undersigned and as outlined in the Asset Purchase Agreement between TERRY DITTRICH CHRYSLER-JEEP, INC. and NORTHLAKE CHRYSLER-JEEP, INC., the receipt of which is hereby acknowledged, hereby forever releases and discharges Terry Dittrich Chrysler-Jeep, Inc., Terrence E. Dittrich, Dawn Dittrich, Simon Investments, L.L.C. . . . from any and all manner of actions, causes of action, suits, accounts, contracts, liens, debts, claims, and demands whatsoever, at law or in equity, and however arising up to the date of these presents, including, particularly, but not exclusively, all matters:
>
> > 1. For all obligations, liabilities and debts owed by the released parties to Mercantile National Bank, including, but not limited to,

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them for sale.

> commercial real estate payoffs, new and used vehicle floor plans and any amounts listed as owing on a March 1, 2004 Settlement Statement among Terry Dittrich Chrysler-Jeep, Inc., Simon Investments, L.L.C. and Northlake Chrysler-Jeep, Inc.

Appellants' App. at 125. The only signature on the Release was that of Dale Clapp, as representative of Mercantile.

The Appellants-Plaintiffs filed their amended complaint on October 1, 2004, alleging duress and undue influence, constructive fraud, unjust enrichment, professional negligence, tortious interference with prospective economic advantage and business relations, tortious interference with contractual relations, slander, intentional infliction of emotional distress, and invasion of privacy on the part of Mercantile. On November 18, 2004,[2] Mercantile filed its answer and counterclaim. In its counterclaim, Mercantile sought a judgment declaring the hold harmless provision valid and enforceable as well as alternative counts claiming fraud, breach of promissory notes, breach of guaranty, breach of contract, and a violation of Indiana's RICO statute on the part of the Appellants-Plaintiffs.

The Appellants-Plaintiffs filed a Motion to Dismiss Mercantile's counterclaim on the basis that the Release barred any claims by Mercantile. In response, Mercantile filed a Motion for Summary Judgment based on the premise that the hold harmless provision from the Asset Agreement, together with the Release, constitute a single, valid and enforceable contract and therefore the hold harmless clause bars any claim proffered by the Appellants-Plaintiffs. Each party subsequently filed memoranda designating evidence and citing caselaw in support of its own motion and in opposition to its opponent's motion. The

[2] Mercantile timely filed a motion for extension of time to file responsive pleading.

designated evidence included the loan agreement and renewals, the Asset Agreement, the Release, an affidavit by Terry, and the depositions of the then chairman of the board and vice president division manager of commercial lending at Mercantile.

The trial court conducted a hearing on the motions on March 30, 2006. The next day the trial court issued an order in which, after determining that it would treat the Appellants-Plaintiffs' motion to dismiss as a motion for summary judgment, it granted Mercantile's motion for summary judgment and denied the Appellants-Plaintiffs' motion. On April 26, 2006, the Appellants-Plaintiffs filed a Motion to Correct Errors. The trial court, by Special Judge Richards, held a hearing on the motion and later denied the motion.

The Appellants-Plaintiffs now appeal the trial court's grant of summary judgment in favor of Mercantile.[3]

Discussion

I. Standard of Review

Our standard of review for summary judgment is the same as that used in the trial court. Harco, Inc. v. Plainfield Interstate Family Dining Assoc., 758 N.E.2d 931, 937 (Ind. Ct. App. 2001). Pursuant to Rule 56 (C) of the Indiana Rules of Trial Procedure, we must determine whether there is a genuine issue of material fact requiring trial, and whether the moving party is entitled to judgment as a matter of law. Id. Neither the trial court nor the reviewing court may look beyond the evidence specifically designated to the trial court. Id. A party seeking summary judgment bears the burden of showing the absence of a factual

[3] The Appellants-Plaintiffs do not raise any issues challenging the trial court's denial of their motion for summary judgment that was converted from a motion to dismiss Mercantile's counterclaims.

issue and that it is entitled to judgment as a matter of law. Id.

A trial court's grant of summary judgment is clothed with a presumption of validity, and the appellant bears the burden of demonstrating that the trial court erred. Carter v. Indianapolis Power & Light Co., 837 N.E.2d 509, 514 (Ind. Ct. App. 2005), trans. denied. Nevertheless, we must carefully assess the trial court's decision to ensure the nonmovant was not improperly denied his day in court. Id.

Generally, construction of a written contract is a question of law for the trial court for which summary judgment is particularly appropriate. Noble Roman's, Inc. v. Pizza Boxes, Inc., 835 N.E.2d 1094, 1098 (Ind. Ct. App. 2005). When interpreting a contract, a court must ascertain and effectuate the intent of the parties. Breeding v. Kye's, Inc., 831 N.E.2d 188, 190 (Ind. Ct. App. 2005). The contract must be read as a whole and the language construed so as not to render any words, phrases, or terms ineffective or meaningless. Id.

II. Analysis

On appeal, the Appellants-Plaintiffs challenge the grant of summary judgment in favor of Mercantile contending that the hold harmless provision only applies to Dittrich Chrysler-Jeep and there is a material issue of fact with respect to the execution of the Asset Agreement as to whether it was signed by Terry, as president of Dittrich Chrysler-Jeep, under duress. Mercantile contends that the trial court was correct in holding that the Asset Agreement and the Release constitute a single contract, making the hold harmless provision applicable to all the Appellants-Plaintiffs, and that there is no designated evidence raising an issue of material fact as to the claim of duress.

A. Applicability of the Hold Harmless Provision

First, we must determine whether the hold harmless provision in the Asset Agreement applies to all Appellants-Plaintiffs or just to Dittrich Chrysler-Jeep. The essential effect of a hold harmless provision is that it bars the promisor from bringing suit against the entity it agrees to hold harmless. The hold harmless provision in the Asset Agreement states "SELLER also agrees to hold harmless Mercantile . . ." "Seller" is earlier defined in the agreement as Terry Dittrich Chrysler-Jeep, Inc. Appellants' App. at 21. The only parties that signed the Asset Agreement were Terry, as president of Dittrich Chrysler-Jeep, and the president of Northlake Chrysler-Jeep. The question is how can the rest of the Appellants-Plaintiffs be held to this provision without being parties to the agreement.

According to the tenets of contract law, the intent of the parties to a contract is determined by the "four corners" of the contract. Dick Corp. v. Geiger, 783 N.E.2d 368, 374 (Ind. Ct. App. 2003), trans. denied. Where the language of a contract is unambiguous, we give effect to the intentions of the parties as expressed in the four corners of the document. Id. Based on looking to the "four corners" of the Asset Agreement, the term "Seller" is unambiguous in that the only person/entity that is bound by the hold harmless provision, according to the plain meaning of the words used, is Terry Dittrich Chrysler-Jeep. This seems to show a clear intention of the parties that the hold harmless provision does not apply to Terry and Dawn as individuals or Simon Investments. However, the trial court came to a different conclusion.

Without further explanation, the trial court stated the basis for granting summary judgment in favor of Mercantile was that the Asset Agreement and the Release "constitute a

single agreement." Appellants' App. at 11. The foundation for this conclusion, Mercantile claims, is that the Asset Agreement containing the hold harmless provision is named as consideration for the Release. Mercantile claims it executed the Release only because it understood that the Dittrichs agreed to "hold harmless" Mercantile via the Asset Agreement. Mercantile asserts that as one contract, the hold harmless provision in the Asset Agreement is imputed to Terry and Dawn, individually, as well as Simon Investments, barring their claims against Mercantile. However, this interpretation cannot stand.

Terry, Dawn, and Simon Investments were not parties to either the Asset Agreement or the Release. The Release was unilaterally executed by Mercantile and therefore only binds Mercantile. Thus, it does not matter whether the documents are viewed as one or two contracts, because Terry, Dawn, and Simon Investments were not parties to either the Asset Agreement or the Release and cannot be held to any of the terms. In conclusion, the hold harmless provision does not bar their claims against Mercantile, and the trial court erred in granting summary judgment for Mercantile as to Terry, Dawn, and Simon Investments. We therefore remand the case to the trial court for further proceedings on the claims brought by Terry, Dawn, and Simon Investments. However, our remand should not be construed as conferring standing upon Terry, Dawn and Simon Investments for their claims against Mercantile for its actions in assisting in the sale of Dittrich Chrysler-Jeep via the Asset Agreement, because Terry, Dawn, as individuals, and Simon Investments were not parties to this transaction.

B. Duress

This still leaves Dittrich Chrysler-Jeep bound by the hold harmless provision, barring

its claims against Mercantile. However, Dittrich Chrysler-Jeep claims there is a material issue of fact whether Terry, as president of Dittrich Chrysler-Jeep, signed the Asset Agreement under duress, thus making the Asset Agreement voidable, including the hold harmless provision.

The original definition of duress in Indiana was that an actual or threatened violence or restraint of a man's person, contrary to law, compelled him to enter a contract. Raymundo v. Hammond Clinic Ass'n, 449 N.E.2d 276, 283 (Ind. 1983). Our Supreme Court then recognized that the modern tendency of courts of law has been to regard as voidable due to duress any transaction that the party seeks to avoid, was not bound to enter into, and which was coerced by fear of a wrongful act by the other party to the transaction. Id. The earlier Indiana requirements for duress are regarded as merged with this broader definition, but the basic concept of the doctrine is still whether the purported victim was deprived of the free exercise of his own will. Id. Mere threats, which fall short of subverting the will, cannot constitute duress. Id.

In essence, Terry, as president of Dittrich Chrysler-Jeep, claims that he was placed under duress by Mercantile when Morrow, the chairman of the board of Mercantile, came over to the Dittrich house and threatened to close the dealership if Terry did not agree to sell it to Northlake Chrysler-Jeep. Even assuming Morrow threatened to foreclose on Dittrich Chrysler-Jeep, it would not have met the definition of duress. In the new broader definition, duress involves the victim being "coerced by fear of a wrongful act by the other party to the transaction." The Dittrichs had deceived Mercantile by not reporting almost $1.5 million in car sales, which put the Dittrichs in default on the loan and placed Mercantile in a position of

possibly losing a large sum of money. Under the loan agreement, Mercantile had the ability to foreclose the dealership without notice in the case of default based on the acceleration clause. Thus, if Morrow made a threat of foreclosure, it was not a wrongful act, because pursuant to the loan agreement, Mercantile was legally allowed to take such action. Instead of immediately foreclosing, Mercantile offered Dittrich Chrysler-Jeep the option to sell its assets in lieu of foreclosure.

In conclusion, there is no genuine issue of material fact as to the duress claim, making the Asset Agreement valid and enforceable. The hold harmless provision within the agreement bars any claims by Dittrich Chrysler-Jeep against Mercantile regarding the sale of its assets to Northlake Chrysler-Jeep. Thus, the trial court appropriately granted summary judgment for Mercantile as to Dittrich Chrysler-Jeep.

Conclusion

Looking at the four corners of the Asset Agreement, the hold harmless provision only bars the claims of the dealership and not the Dittrichs, individually, or Simon Investments, because they were not parties to this contract nor were they parties to the Release that was unilaterally executed by Mercantile. Therefore, the trial court erred in granting summary judgment in favor of Mercantile in regard to the claims of the Dittrichs and Simon Investments. We remand those claims to the trial court. However, the trial court appropriately granted summary judgment as to Dittrich Chrysler-Jeep, because the Asset Agreement is not voidable due to duress.

Affirmed in part, reversed in part and remanded.

RILEY, J., and MAY, J., concur.