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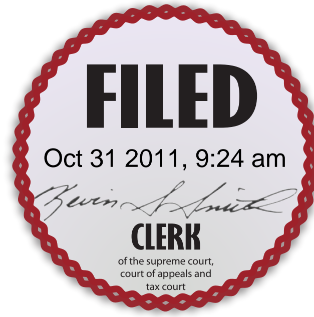

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IN THE
COURT OF APPEALS OF INDIANA

ZACHARY KRACHINSKI, Appellant-Petitioner, vs. CINDY SCHOOF, Individually, CENTURY 21 – 1ST TEAM, INC., LON F. TERRY, Individually, and HORIZON BANK, N.A., as Trustee of the Lon F. Terry Trust, Appellees-Respondents.	)	No. 46A03-1009-CC-498

APPEAL FROM THE LAPORTE SUPERIOR COURT
The Honorable William J. Boklund, Judge
Cause No. 46D04-0605-CC-151

October 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Zachary Krachinski appeals from the trial court's order denying Krachinski's *Motion to Vacate October 4, 2007, Order Granting Summary Judgment to Cindy Schoof and Century 21-1st Team, Inc.* and making its previous grant of summary judgment in favor of Cindy Schoof (Schoof) and Century 21-1st Team, Inc. (Century 21) a final, appealable judgment. Krachinski presents two issues for our review, which we consolidate and restate as: Did the trial court properly grant summary judgment in favor of Schoof and Century 21?

We affirm.

On September 14, 2000, Schoof, a licensed real estate agent in the State of Indiana who was at the time affiliated with Century 21, entered into an exclusive listing contract with Lon Terrey to serve as the listing agent in the sale of approximately twenty-five acres of undeveloped property located near Meer Road in Michigan City, Indiana (the Property).[1] On the LaPorte County Association of Realtors Multiple Listing Service (MLS Listing), Schoof identified the Property as zoned "R1" or residential and commented that the Property was "ideal for an airport office/industrial park sub-divided into smaller acerage [sic] sites."[2] *Appellant's Appendix* at 123. In listing the Property as being zoned residential, Schoof relied

[1] Terrey held the Property in the Lon F. Terrey Trust. The Horizon Bank N.A., Michigan City, Indiana, served as Trustee of the Terrey Trust.

[2] Schoof had previously listed the Property for Terrey in 1996 and in that listing noted that the Property was zoned "agriculture". *Appellant's Appendix* at 177.

upon information from the LaPorte County Assessor's Office in the form of a "hard card" that designated the Property's "Land Type" as "1 Residential Excess acreage." *Id*. at 135.

In the spring of 2001, Krachinski contacted Schoof and inquired about the Property. Krachinski was a licensed real estate agent in the State of Indiana[3] and he was representing himself as the buyer's agent when he inquired about the Property. Krachinski maintains that he told Schoof of his plans to develop the property into a proposed residential subdivision. During the period of negotiations about the Property, Schoof and/or Terrey provided Krachinski with diagrams showing easements, gas lines, sewer line possibilities, and a proposed residential subdivision plat. Prior to making an offer on the Property, Krachinski went to the LaPorte County Assessor's Office and pulled the hard card for the Property. In his affidavit, Krachinski acknowledged that the hard card for the Property stated that Property had "a zoning classification as R-1 or residential." *Id*. at 157.

Based upon the information he gathered, on or about May 8, 2001, Krachinski tendered a purchase agreement for purchase of the Property. Terrey tendered a counteroffer that was accepted by Krachinski. Krachinski closed on his purchase of the Property on June 8, 2001. Pursuant to the terms of the purchase agreement, Krachinski elected to purchase the Property in its "AS IS" condition, waived all inspections, and released the seller, real estate brokers, and agents from any and all liability relating to any alleged deficiencies with the property. *Id*. at 133. Krachinski also waived his right to obtain a survey of the Property and placed no other conditions in the contract making his purchase contingent upon obtaining the

[3] Krachinski was affiliated with County-Wide Properties, LLC.

necessary variances, approvals, title endorsements, or other administrative requirements that might be imposed by local officials.

In 2002, Krachinski listed the Property for sale on his own behalf and advertised the Property as being zoned R-1 or residential. At some time after he listed the Property for sale, Krachinski contracted an engineering and land surveying company in connection with the development of a residential subdivision plat on the Property. Krachinski paid $53,450.00 for the engineering services. Krachinski presented his proposed subdivision plat to the Michigan City Planning Division for approval, at which time Krachinski was informed that the Property was zoned agricultural, not residential. Krachinski engaged the services of an attorney to prepare, submit, and pursue a rezoning action for the Property. His request to rezone the Property was denied.

On May 24, 2006, Krachinski filed a complaint against Schoof, Century 21, Terrey, and The Horizon Bank N.A., Michigan City, Indiana, as Trustee of the Lon F. Terrey Trust, alleging fraud and misrepresentation based upon representations that the Property was zoned residential. On December 21, 2006, Schoof and Century 21 filed a motion for summary judgment and supporting materials, including the Affidavit of Schoof, which was dated December 18, 2006. Attached as Exhibit 4 to Schoof's affidavit was a document, referred to as a hard card, that Schoof obtained from the county assessor's office prior to listing the Property on the MLS Listing in 2000 and that she relied upon in representing the zoning classification as residential. On October 4, 2007, the trial court, after a hearing and submission of additional briefs on the issue of zoning classification, granted summary judgment in favor of Schoof and Century 21.

In December 2008, Terrey filed a cross-claim against Schoof and Century 21 seeking damages and indemnification for the claims asserted against him by Krachinski. On October 1, 2009, Schoof was deposed in connection with Terry's cross-claim. On October 30, 2009, Schoof submitted an errata sheet under Ind. Trial Rule 30, correcting and/or further explaining some of the responses she gave during her deposition. On December 9, 2009, Schoof and Century 21 filed a Motion to Amend Affidavit and Substitute Exhibit, specifically requesting permission to substitute the proper hard card to the affidavit Schoof submitted in support of Schoof and Century 21's motion for summary judgment. On February 1, 2010, Krachinski filed "Plaintiff's Objections to Motion of Defendants Cindy Schoof and Century 21 1st Team, Inc. to Alter Affidavit of Cindy Schoof and Plaintiff's Cross-Motion to Vacate October 4, 2007 Order Granting Summary Judgment to Cindy Schoof and Century 21 1st Team, Inc." *Appellant's Appendix* at 294.

The trial court held a hearing on all pending motions on July 27, 2010. On August 24, 2010, the trial court issued an ordered granting Schoof and Century 21's request to amend Schoof's affidavit and substitute the correct hard card for the incorrect one originally attached thereto. The court also denied Krachinski's motion to vacate the October 4, 2007 order granting summary judgment in favor of Schoof and Century 21 and expressly ordered that because its summary judgment order disposed of all issues between Krachinski and Schoof and Century 21, the judgment was final and appealable. Krachinski filed his Notice of Appeal on September 15, 2010.4

[4] Krachinski made a request for oral argument in his Appellant's Case Summary and further noted his request for oral argument on the cover of his Appellant's Brief and Reply Brief. Krachinski did not, however, file a

Krachinski argues that the trial court erred in denying his motion to vacate the grant of summary judgment in favor of Schoof and Century 21. He notes that the primary issue in the case as it relates to his claims of fraud and misrepresentation is the zoning classification of the Property and Schoof's knowledge thereof. Therefore, Krachinski asserts, the evidence on this question, i.e., Schoof's affidavit, is wholly unreliable in light of Schoof and Century 21's motion to amend the affidavit and Schoof's subsequent deposition testimony. Krachinski thus contends that genuine issues of material fact exist thereby precluding summary judgment.

Our standard of review of a summary judgment order is well-settled: summary judgment is appropriate if the "designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Ind. Trial Rule 56(C). Relying on specifically designated evidence, the moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *I/N Tek v. Hitachi Ltd.,* 734 N.E.2d 584 (Ind. Ct. App. 2000). If the moving party meets these two requirements, the burden shifts to the nonmovant to set forth specifically designated facts showing that there is a genuine issue for trial. *Id.* A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an

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separate motion with this court requesting oral argument. *See* Ind. Appellate Rule 15(C)(4)(d) (noting that the Appellant's Case Summary shall indicate whether a request for oral argument is anticipated); App. R. 52(B) ("A party's motion for oral argument shall be filed no later than seven (7) days after any reply brief would be

issue. *Gilman v. Hohman,* 725 N.E.2d 425 (Ind. Ct. App. 2000). We will affirm if the trial court's grant of summary judgment can be sustained on any theory or basis in the record. *Clary v. Dibble,* 903 N.E.2d 1032 (Ind. Ct. App. 2009), *trans. denied.*

To recover under a theory of actual fraud, Krachinski is required to prove that there was a (i) material misrepresentation of past or existing fact by the party to be charged, (ii) that was false, (iii) that was made with knowledge or reckless ignorance of the falseness, (iv) that was relied upon by the complaining party, and (v) that proximately caused the complaining party injury. *Rice v. Strunk,* 670 N.E.2d 1280 (Ind. 1996). Thus, as long as Schoof and Century 21 demonstrated that the designated evidence negated at least one element of Krachinski's case, the trial court's grant of summary judgment will be upheld. *See Hermann v. Yater*, 631 N.E.2d 511 (Ind. Ct. App. 1994).

In challenging the grant of summary judgment, Krachinski attacks the validity of Schoof's affidavit, directing us to the fact that she sought to amend the affidavit submitted in support of the previous motion for summary judgment by substituting the proper "hard card" as an attachment thereto. Krachinski argues that Schoof and Century 21's motion to amend is a "brazen attempt to change previously given testimony after Schoof, Century 21 and the Court have already relied upon that testimony in granting summary judgment in favor of Schoof and Century 21." *Appellant's Appendix* at 296. Krachinski maintains that this is evidence that Schoof and Century 21 presented false information in support of their motion for summary judgment and thus argues that summary judgment should be vacated because

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due under Rule 45(B)"). Even if Krachinski had filed the proper procedure in requesting oral argument, we would have denied his request.

the trial court ultimately relied upon such false information in granting summary judgment in favor of Schoof and Century 21.

We begin by considering the effect of Schoof and Century 21's motion to amend Schoof's affidavit. The request to amend the affidavit was merely a request to substitute the proper hard card for the hard card that was originally attached to the affidavit. Schoof's affidavit was designated as evidence in support of the motion for summary judgment filed on behalf of Schoof and Century 21 in December 2006. Schoof's counsel explained in the motion to amend and at a hearing before the court that the mistake was inadvertent and was akin to a scrivener's error.[5]

In Schoof's affidavit, she averred that in listing the Property for sale in 2001 and identifying its zoning classification as residential, she relied upon the hard card she obtained from the county assessor's office. Referring to the hard card attached to her affidavit, Schoof stated that the hard card indicated that "the Property had a zoning classification of residential." *Id*. at 130. A review of the hard card shows that to the right of a place for the zoning designation is a column titled "Land Type" under which is written "1 Residential Excess Acreage." *Id*. at 135.

It was subsequently discovered in October 2009 that the hard card attached to Schoof's 2006 affidavit was not the hard card upon which Schoof relied in listing the Property as zoned residential. To be sure, the hard card originally attached to Schoof's affidavit was dated December 6, 2006, which was over five years after Schoof listed the

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[5] The trial court apparently agreed. As noted above, the trial court granted Schoof and Century 21's motion to amend over Krachinski's objection.

Property for sale. Schoof and Century 21 requested permission from the trial court to amend Schoof's 2006 affidavit by substituting the proper hard card, that being the actual hard card Schoof relied upon in determining that the Property would be listed for sale as being zoned residential. The correct hard card is dated September 2000.

A comparison of the 2000 and 2006 hard cards reveals that while they are not identical in all respects, they are identical with regard to the information referred to and relied upon by Schoof in her affidavit concerning her representation as to the zoning classification of the Property. The hard cards both provide that the "Land Type" classification for the Property is "1 Residential Excess Acreage." *Id*. at 135, 279. Based on the circumstances, we cannot conclude that substitution of the proper hard card is evidence that Schoof and Century 21 presented false information in support of their motion for summary judgment. The substitution of the proper hard card to Schoof's affidavit is not grounds for overturning summary judgment in this case.

Krachinski also challenges the grant of summary judgment by pointing to Schoof's 2009 deposition testimony, which he claims contradicts statements she made in her affidavit that was submitted in support of summary judgment. Following the filing of Terrey's cross-claim against Schoof and Century 21, Schoof was deposed. During the deposition, counsel for Krachinski questioned Schoof in a manner geared to elicit an admission from her that there was no residential zoning classification on the hard card that she maintained she relied upon in listing the Property as residential. In fact, Schoof agreed that on the hard card there

was nothing marked directly next to zoning.[6] Schoof maintained, however, that the "Land Type" designation was what she relied upon in listing the Property as residential and explained that it was her customary practice to rely upon the land type designation on the hard card.

Schoof's deposition testimony does not contradict her affidavit. Schoof continues to adhere to her reliance on the "Land Type" designation on the hard card as the source she used and still uses for determining zoning classification of a particular piece of real estate. Schoof explained that it was common practice among real estate agents to rely upon the hard card in determining zoning classification, that she has always relied upon the hard card, and that she continues to rely upon the hard card for such information.

We further note that in opposition to summary judgment, Krachinski submitted his own affidavit in which he admitted he relied upon the same hard card from the county assessor's office in conducting what he claims was due diligence on his part before purchasing the Property. In his affidavit, Krachinski averred that the hard card indicated that the property was zoned residential. *Id*. at 281. As noted above, Krachinski was himself a licensed real estate agent and served as his own agent during the negotiations and purchase of the Property. We further note that approximately a year after he purchased the Property, Krachinski listed the Property for sale and in the listing identified the Property as zoned residential.

Krachinski also argues that there was evidence in the record that proved Schoof had

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[6] Our review of the hard card leads us to conclude that the only reasonable interpretation is that the information to be found next to the field for zoning is the "Land Type" designation, under which heading is

actual knowledge that the Property was not zoned residential, but that it was indeed zoned agricultural. Krachinski points to the fact that Schoof had previously listed the Property for Terrey in 1996 and in that prior listing identified the Property as zoned agricultural. The designated evidence further showed, however, that the prior listing had expired and the Property was off of the market for some time. In 2001, Terrey decided to relist the Property and contacted Schoof, who created a new listing for the Property. In doing so, Schoof obtained the hard card from the auditor's office and relied upon the land-type designation thereon in listing the Property as zoned residential. That Schoof had previously listed the Property as zoned agricultural does not create a genuine issue of material fact as to her knowledge of the zoning classification of the Property when she relisted it five years later, especially in light of her unwavering statement that she relied upon the land-type designation on the hard card obtained from the auditor's office at the time of listing the Property in 2001. Regardless of whether the information on the hard card was reliable, Schoof, as a matter of common practice, did rely on the hard card. Krachinski's arguments on appeal that Schoof was not justified in relying upon the hard card for the zoning classification is disingenuous given his own reliance upon the same hard card when confirming that the Property was zoned residential prior to his purchase thereof. Krachinski, having himself relied on the information contained in the hard card, has failed to establish that Schoof's reliance thereon was unreasonable, let alone reckless. We therefore conclude that any representation regarding zoning based on reliance upon the hard card falls short of a knowing or reckless

"1 Residential Excess Acreage." *Id*. at 135.

misrepresentation.

In addition to the fact that the designated evidence does not support a finding of a knowing or reckless misrepresentation on behalf of Schoof, we also find that the evidence shows that Krachinski did not rely on Schoof's representation that the Property was zoned residential. The element of reliance consists of two distinct parts: the fact of reliance and the right of reliance. *Dawson v. Hummer*, 649 N.E.2d 653 (Ind. Ct. App. 1995). In Indiana, it is well settled that "a purchaser of property has no right to rely upon the representations of the vendor of the property as to its quality, where he has a reasonable opportunity of examining the property and judging for himself as to its qualities." *McCutchan v. Blanck*, 846 N.E.2d 256, 265 (Ind. Ct. App. 2006) (quoting *Kashman v. Haas,* 766 N.E.2d 417, 422 (Ind. Ct. App. 2002)). We have before stated that "common sense dictates that a consumer be diligent in protecting his interests in a purchase of this magnitude." *South v. Colip*, 437 N.E.2d 494, 499 (Ind. Ct. App. 1982).

Here, Krachinski, a licensed real estate agent, represented his own interests as the buyer. In his affidavit submitted in opposition to summary judgment, Krachinski averred that prior to purchasing the Property, he conducted due diligence by going to the auditor's office and obtaining a copy of the hard card for the Property to confirm the representations made in the MLS Listing for the Property. Krachinski admitted that he relied on the hard card in determining for himself, albeit incorrectly, that the Property was zoned residential. Krachinski relied upon and interpreted the hard card in the same manner Schoof did in listing the Property zoning classification as residential. This evidence demonstrates that Krachinski did not rely upon Schoof's representations.

Krachinski also faults Schoof for not obtaining the zoning classification for the Property from the proper public domain. As pointed out by Krachinski, the zoning classification for the property was readily available from the office that maintained the official zoning records, which was not the county assessor's office. Krachinski's argument in this regard cuts both ways. If the zoning classification of the property was readily available and easily accessible, Krachinski had access to all information in the public record and could have obtained the official zoning records in conducting his due diligence as the buyer's agent before going through with a transaction of this magnitude. We have before found that "if a purchaser of real property has notice or with ordinary diligence should have had notice of a problem with the real estate, the purchaser cannot attack the validity of the contract for fraud, misrepresentation, or concealment of that problem." *Craig v. ERA Mark Five Realtors*, 509 N.E.2d 1144, 1148 (Ind. Ct. App. 1987).

Given that the designated evidence negates two elements of Krachinski's fraud claim, we conclude that the trial court properly granted summary judgment in favor of Schoof and Century 21.

Judgment affirmed.

BAILEY, J., and BROWN, J., concur.