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**IN THE
COURT OF APPEALS OF INDIANA**

FIRST INVESTMENT GROUP CORP.,)

Appellant-Plaintiff,)

vs.)

CHARLES P. HACKER,)

Appellee-Defendant.)

No. 49A02-0608-CV-694

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David J. Dreyer, Judge
Cause No. 49D10-0410-PL-1979

November 15, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

First Investment Group Corporation (FIG) appeals a judgment in favor of Charles P. Hacker in what began as competing lawsuits filed by FIG and Hacker regarding a real estate contract between them for the purchase of real estate in Marion County, Indiana. Although the parties present multiple issues, one is dispositive. That issue, restated, is: does the evidence support the trial court's conclusion that Hacker fully satisfied the terms of the land sale contract with FIG?

We affirm.

The undisputed facts are that Brian Eads established FIG as an Indiana corporation in order to invest in real estate. At all times relevant to this action, Eads owned one hundred percent of the company. At some point, FIG acquired the property located at 1701 North College Avenue (the Property) in Indianapolis. On June 28, 2001, FIG entered into a contract to sell the Property to Hacker for \$101,500. Under the terms of the contract, Hacker would pay \$15,000 down, and then \$5000 when the contract was signed, \$5000 each on September 5 and October 5, 2001, ten monthly payments of \$791.73 commencing on November 5, 2001, and a balloon payment of \$72,429.15 on October 5, 2002. Hacker paid the three \$5000 payments due under the contract. At some point, Larry Franke became involved in paying some of Hacker's loan obligations with respect to the Property. Franke was a mutual acquaintance of both Eads and Hacker and had been associated with Eads in business deals on several previous occasions. Franke occasionally loaned Hacker money with which Hacker made payments to FIG for the purchase of the Property. There were other times when Franke paid money directly to

FIG on Hacker's behalf.¹ The date of the balloon payment came and went without the balloon payment being made. Nevertheless, Hacker and Franke (on behalf of Hacker), continued to make payments, and FIG continued to accept the payments.

In June 2004, Eads called Franke and asked Franke to make the balloon payment on Hacker's behalf. Franke contacted FIG's bookkeeper and asked for the amount due on the land contract and was informed that the balance was \$9000. Franke then contacted Eads and offered to pay \$8000 in satisfaction of the land sale contract. Eads agreed. FIG prepared a document entitled "Satisfaction of Land Contract" (the Satisfaction), *Transcript* at 49, and attached an addendum. On June 2, 2004, Franke gave Eads a check for \$8000. The following handwritten notation appeared on the memo line of the check: "Loan Hacker – Payoff 1701 College". *Appellant's Appendix* at 129. Thereafter, Eads, on behalf of FIG, executed the Satisfaction that stated, in pertinent part:

The undersigned, Brian J. Eads, President of First Investment Group, Corp., the present owners of the land contract in the original amount of One Hundred and Two Thousand Five Hundred Dollars (\$102,500.00)², made, executed and delivered June 28, 2001 by First Investment Group, Corp [sic] on the property commonly referred to as 1701 North College Avenue, Indianapolis, Indiana as recorded in the office of the Recorder of Marion County, State of Indiana, has been satisfied.

¹ The record reveals that the Property was an investment property that included a multi-unit apartment building. Apparently, the arrangement between Hacker and Franke was that Franke would share in the proceeds, commensurate with his contributions, when Hacker later sold the Property for profit.

² It appears that the amount recorded here is incorrect, as the parties both state that the purchase price was \$101,500, not \$102,500.

Id. at 113 (footnote supplied). Attached to the Satisfaction was Addendum A, which provided, among other things, that Franke would be responsible for paying property taxes on the Property. Sometime shortly after the June 2 payment, when Franke asked about taxes then due, Eads replied he (Eads) “was going to take care of it.” *Transcript* at 148. Also, the Satisfaction provided, “Any discrepancies will be immediately reported to the other party and corrected within 30 days.” *Exhibits*, Plaintiff’s Exhibit 9. The Satisfaction was filed at the Marion County Recorder’s Office on July 15, 2004.

After the \$8000 payment was made and the Satisfaction was executed and later recorded, disputes arose between the parties concerning the land. Apparently, FIG failed to pay the taxes due and the property went to tax sale. FIG redeemed the property out of tax sale with a payment of \$12,815.39. On October 14, 2004, FIG retained funds to make that payment by negotiating a contract with 1700 Limited Realty whereby FIG filed a complaint to Cancel or Foreclose Land Contract against Hacker in order to provide 1700 Limited Realty with clear title to the Property. That complaint was filed on October 19, 2004. FIG then sold the Property to 1700 Limited Realty, and the proceeds were placed in escrow pending the outcome of the instant litigation. Also on October 14, FIG executed a corporate warranty deed for the Property in favor of 1700 Limited Realty and that deed was recorded on January 20, 2005. On February 10, 2005, 1700 Limited Realty filed a motion to intervene and that motion was granted on March 8, 2005. On November 20, 2004, Hacker filed a complaint against FIG seeking either specific performance of the land sale contract or for damages caused by a breach thereof. The two cases were

consolidated on March 28, 2005. The matter proceeded to a bench trial on June 26, 2006. On July 25, 2006, the trial court issued findings of fact and conclusions of law and entered judgment in favor of Hacker. The court ordered 1700 Limited Realty to execute a quitclaim deed conveying the Property to FIG in order to permit FIG to give Hacker fee simple merchantable title by general warranty deed, free and clear of any mortgages. FIG appeals that ruling.

The trial court's ruling was accompanied by special findings of fact and conclusions of law pursuant to Ind. Trial Rule 52(A). When reviewing a judgment based on such findings, we must first determine whether the evidence supports the findings, and second, whether the findings support the judgment. *Gov't Payment Serv., Inc. v. Ace Bail Bonds*, 854 N.E.2d 1205 (Ind. Ct. App. 2006), *trans. denied*. We may set aside findings of fact only when they are clearly erroneous. *Id.* "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. In order to determine that a finding or conclusion is clearly erroneous, our review of the evidence must leave us with the firm conviction that a mistake has been made." *Id.* at 1208 (internal citation omitted). In conducting this review we do not reweigh the evidence and consider only the evidence favorable to the trial court's judgment. *Keesling v. T.E.K. Partners, LLC*, 861 N.E.2d 1246 (Ind. Ct. App. 2007).

In the instant case, the critical findings relate to the balance owed at the time Franke delivered the \$8000 payment to FIG that purportedly paid off Hacker's loan. At trial, FIG presented evidence in the form of financial statements and a ledger sheet prepared specifically

for this lawsuit that reflected a balance of \$85,000 on the property. On the other side of the lawsuit, Hacker and Franke presented evidence reflecting a history of loan payments made by those two men that differed from the information contained in FIG's evidence and exhibits. The trial court considered that evidence and issued the following findings:

7. There are discrepancies between Exhibit E, the records of [FIG], and defense testimony regarding monies paid by Mr. Hacker.

8. Larry Franke made several substantial payments to [FIG] on behalf of Mr. Hacker.

9. Mr. Franke and Brian Eads had a meeting on June 2, 2004. At that meeting, Exhibit C, which is a check dated June 2, 2004, was given to [FIG] by Mr. Franke on behalf of Mr. Hacker.

10. [FIG] accepted and cashed that check which has in the memo section of the check the following language: "loan Hacker-payoff 1701 College".

11. At page 21 of Mr. Eads [sic] deposition, taken just twelve days before trial on June 14, 2006, Mr. Eads testified that he had in fact received the exact same check on behalf of [FIG], and had deposited the check. In fact, he testified that the memo section stating "loan Hacker-payoff 1701 College" was on the check when he received it.

12. Mr. Eads makes other admissions that he may have received \$5,000.00 or \$6,000.00 from Mr. Franke on [sic] behalf of Mr. Hacker's land contract.

13. None of the general ledgers of [FIG] or its alleged "running balance", or the specially created Exhibit G entitled "[FIG]'s Financial Dealing With Charles Hacker", contain the \$5,000.00 or \$6,000.00 cash payment that Mr. Eads testified that he received from Larry Franke on June 2, 2004. None of these documents contain reference to the \$8,000.00 payment acknowledged by Mr. Eads in his deposition. This is probative evidence that [FIG] failed to credit all appropriate payments to the Hacker land contract.

14. After the \$8,000.00 check was tendered to and accepted to [sic] [FIG], Brian Eads executed Exhibit 9, which is entitled “Satisfaction of Land Contract”.

15. The Court finds that Exhibit 9 was executed by Brian Eads on June 2, 2004, and that it was complete in the form tendered as an exhibit by Plaintiff’s counsel, and as it exists in the Court record.

16. Mr. Eads’ testimony that there was an additional attachment to Exhibit 9, which was marked at trial as Exhibit 2^[3], is not credible, and there is no reasonable inference that there is an additional attachment showing that \$85,000.00 remains due and owing.

17. Mr. Hacker established at trial that during the course of discovery he had requested from Mr. Eads all documents that had been executed regarding 1701 College. Mr. Eads admitted that Exhibit D was the response to discovery that he gave for that request. Exhibit D contains a copy of the Satisfaction of Land Contract and its Addendum A in the exact same form that was tendered as Exhibit 9. Even Mr. Eads in his own discovery response did not attempt to attach Exhibit 2 or indicate that Exhibit 2 was in any way attached to the Satisfaction of Land Contract.

18. In fact, Mr. Eads testified that although Exhibit 2 was attached to the Complaint as a calculation of the damages, it was never produced in discovery as a document that had been exchanged between the parties or attached to anything in the contractual dealings between the parties. Furthermore, in Exhibit B, Mr. Eads again attached as Exhibit 1 what he represented to be a true and accurate copy of the Satisfaction of Land Contract. That document only had the Addendum “A” attached to the Satisfaction of Land Contract. There was not an Exhibit 2 or any other document attached to the Satisfaction of Land Contract.

19. Furthermore, during the summary judgment process, [FIG] executed an affidavit swearing under penalties for perjury that the Satisfaction of Land Contract form and Addendum A were drafted by Larry Franke, a witness in this case who gave financial assistance to Mr. Hacker.

³ Exhibit 2 was a document prepared specifically for this litigation by FIG purporting to list the loan payments made on Hacker’s behalf.

Yet at trial [FIG] admitted that it had drafted both the Satisfaction of Land Contract and the Addendum A of its own accord.

20. Page 1 of the Satisfaction of Land Contract states without equivocation that the land contract dated June 28, 2001 “has been satisfied.” The Satisfaction of Land Contract was filed with the Marion County Recorder’s Office on July 15, 2004. The first page of the Satisfaction of Land Contract states, “please see Addendum “A” for additional terms.” The satisfaction form does not state that the additional term means that the land contract has not been satisfied.

21. The additional terms show additional agreements made between Larry Franke and Brian Eads of [FIG], but they do not address the satisfaction of the land contract. The [sic] third paragraph of Addendum A states:

Both Parties reserve the right to research and review the loan history. Any discrepancies will be immediately reported to the other party and corrected within 30 days. Larry Franke and Minnesota Investments will off-set any (if any) monies owned [sic] to [FIG] by way of funds disbursed at closing of the land deal located at Southeastern and Minnesota.

This is inconsistent with [FIG]’s argument that \$85,000.00 was still due and owing.

Appellant’s Appendix at 12-15 (one internal footnote omitted and one internal footnote supplied).

In a nutshell, FIG produced exhibits purporting to detail the payment history on Hacker’s mortgage loan and claimed that those exhibits reflected a balance of approximately \$85,000.00. Hacker and Franke assailed the accuracy of those exhibits, which were produced specifically for purposes of this litigation, by presenting evidence of payments made on the loan by either Hacker or Franke that were *not* reflected in FIG’s exhibits. Moreover, and just as significantly, Franke and Hacker offered the Satisfaction

that was drafted and executed by FIG, which reflected that the \$8000 payment made by Franke on June 2, 2004 paid off the mortgage. As reflected in the foregoing findings and conclusions, the trial court determined that FIG's exhibits were not accurate and for that reason rejected them as proof that the indicated balance was still owed following the \$8000 payment. The court also placed great legal significance on the Satisfaction, holding that it operated in effect as an admission on FIG's part that Hacker's obligation had been fulfilled.

Our review of the record reflects that the trial court's findings were supported by the evidence. Hacker and Franke testified as to payments they made that were not reflected in FIG's exhibits. In fact, FIG, through Eads, acknowledged that some cash payments had been made that were not reflected in the exhibits, although it disputed the amount of those payments. This supports the trial court's conclusion that FIG's payment exhibits were not accurate.

We turn now to the evidence presented by Hacker and Franke concerning whether a balance was due at the time of the purported Satisfaction. Hacker's and Franke's testimonies reflect that neither kept detailed records of the payments they made on Hacker's behalf. When asked if he kept records or a ledger reflecting payments he made, Hacker answered that he "may have had something like that, but [he did not] remember if [he] did." *Transcript* at 207. Hacker was then asked what his records showed concerning the amount owed as of June 2, 2004, and he responded he did not know because he was unsure how much Franke had paid to FIG on his behalf. According to

Hacker, he “just took Mr. Franke’s word” when Franke advised him that Eads reported a balance was \$9,000 as of that date. *Id.* at 208.

The foregoing evidence hardly paints a clear picture as to the exact amount paid on Hacker’s mortgage, and thus owed thereon as of June 2, 2004. On the one hand, there were FIG’s records, which consisted of an exhibit produced with an eye to this litigation, and which clearly was not entirely accurate. On the other hand, there were the combined testimonies of Hacker and Franke, which detailed a patchwork of somewhat irregular payments to FIG from one party or the other. The payments from Hacker were, of course, on his own behalf. The payments from Franke sometimes were funneled through Hacker and sometimes were made directly to FIG on Hacker’s behalf. Hacker did not keep a record of the payments made on his behalf by Franke; nor, it appears, did Franke. Thus, after rejecting FIG’s payment exhibits as incomplete, there was no complete and accurate ledger of payments made on the property from which the trial court could base a determination about a sum certain paid on Hacker’s loan obligation. The evidence, such as it was, reveals that there seems to be no dispute that Hacker made a total of \$42,804.90 in payments by check. Franke testified that he made payments to FIG on Hacker’s behalf in an amount somewhere between \$30,000 and \$60,000. Based upon that evidence, the trial court could have found that Hacker’s financial obligation was only partially met, or it could have found that the loan was paid off in its entirety. There was evidence to support either conclusion. In light of that, the Satisfaction takes on a heightened significance.

When Eads called Franke about making a payment on Hacker's behalf, it appears that neither Franke nor Hacker had records from which they could determine the then-current balance of Hacker's loan. For that reason, Franke asked Eads for the amount due and was informed it was \$9000. Franke offered to pay \$8000 and that offer was accepted. It was Franke's understanding that the \$8000 check would pay off the loan; that understanding was written on the memo line of his check and also was unambiguously set forth in the Satisfaction. In fact, Hacker is close to the mark in observing, "the trial court did not base its judgment in Hacker's favor based upon a mathematical calculation after hearing concrete numbers of payment made to and credits received by FIG from Hacker." *Appellee's Brief* at 15. In this case, there simply was no credible, comprehensive accounting of all the payments made on Hacker's loan. There was, however, concrete evidence that Hacker and Franke together paid a substantial portion of the loan, i.e., as little as seventy percent and as much as the entire amount of Hacker's loan. The trial court's conclusion that Hacker satisfied his obligations under the land sale contract is supported by uncontroverted evidence reflecting the payment of a substantial portion of the loan, and the facts that Franke asked FIG for a balance, paid the amount reported by FIG, and, after receiving said payment, FIG prepared the Satisfaction and Eads signed it on behalf of FIG, thereby attesting to the fact that Hacker had fulfilled his obligations under the land sale contract.

Given the muddled evidence of loan payments made on Hacker's behalf, we agree with the trial court that the resolution of this lawsuit ultimately turns upon the

Satisfaction drafted and signed by FIG. The evidence supports the trial court's finding that the Satisfaction was valid and therefore that Hacker fulfilled his obligations under the land sale contract. Assuming Hacker satisfied his obligations under the land sale contract, it follows that the trial court did not err in ordering that the deed for the Property be delivered to Hacker. It also follows that FIG was not entitled to foreclosure on the Property.

Judgment affirmed.

BAKER, C.J., and CRONE, J., concur.