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IN THE COURT OF APPEALS OF INDIANA

CENTER PEACE MINISTRIES, INC. and GILBERT L. JUSTICE, JR.,	)	
Appellants-Defendants,	)	
vs.	)	No. 76A03-0603-CV-108
ASSEMBLIES OF GOD FINANCIAL SERVICES GROUP,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE STEUBEN SUPERIOR COURT
The Honorable William C. Fee, Judge
Cause No. 76D01-0411-MF-562

November 20, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Center Peace Ministries, Inc. ("CPM") and Gilbert Justice Jr. ("Justice") appeal from the Steuben Superior Court's order granting Assemblies of God Financial Service Group's ("AGF") motion for summary judgment. On appeal, CPM contends that there were issues of fact regarding its promissory estoppel and unjust enrichment claims that precluded summary judgment. We affirm.

Facts and Procedural History

On January 18, 2003, Calvary Temple executed a promissory note for $5,260,000 in favor of AGF, which AGF promptly recorded. The note was secured by two parcels of land, one in Allen County and the other in Steuben County. Calvary Temple then began to discuss renting the Steuben County property to Justice, Christine Justice, and CPM, of which Justice is the director and president. AGF, the mortgagee, first reviewed and made several changes to the lease before it was signed by the parties on September 27, 2003.

The lease was for a two-year term beginning in September 2003 with the option to renew for an additional year, which CPM exercised. It also contained an option to purchase the Steuben County property for $2,000,000 any time after the first year. The terms of the lease, specifically paragraph 15(b), said that the lease was subordinate to the existing mortgage on the property. Regarding CPM's relationship with AGF, paragraph 15(a) of the lease also stated:

> If this Lease is in full force and effect and there are no defaults hereunder on the part of Lessee, Lessee's right to possession of the Leased Premises and Lessee's right arising out of this Lease shall not be affected or disturbed by the mortgagee in the exercise of any of it rights under the mortgage(s) or note(s) secured thereby.

Appellant's App. p. 51.

Regarding CPM's rent for the property, the lease provided:

> Lessee agrees to use all escrowed Rent for capital improvements to the Leased Premises ("Capital Improvements"), provided, however, that payment for a boundary survey of the Leased Premises shall be made from the first Lease Year's Rent. Lessor shall take title to all Capital Improvements. Escrowed Rent shall not be used for the payment of regular maintenance, taxes, utilities or other routine operating expenses.

Id. at 46. Another provision of the lease further states:

> A default will have occurred under this Lease if . . . (7) Lessee fails to expend at least ninety percent (90%) of the escrowed Rent during the twelve month period following payment of the Rent for the first Lease Year, or fails to expend the full amount of the escrowed Rent by the end of the Lease Term.

Id. at 49-50. From September 2003 through November 2004, CPM and Justice spent around $600,000 of their escrowed rent on capital improvements to the Steuben County property. During this time, they also operated Oakhill Campground, a nondenominational campground and retreat center, on the premises.

The lease further addresses the issue of foreclosure on the property in paragraph 16:

> Lessor shall indemnify Lessee from and against any loss, damage, claim or suit, including reasonable attorney's fees, arising from the foreclosure, or the lawsuit of a foreclosure, of any present or future mortgage encumbering the Leased Premises by Lessor's mortgagee.

Id. at 52. Paragraph 21 of the lease further warrants a covenant of quiet enjoyment. Id. at 55.

At the end of 2003, Calvary Temple was involved in a lawsuit, which resulted in a judgment against Calvary Temple. At this time, Calvary Temple began having financial problems. In February 2004, Calvary Temple and the Senior Vice President of AGF,

Kert Parsley ("Parsley"), met with Justice to discuss the problems. Parsley told Justice that AGF intended to work with him to allow Justice and CPM to exercise their option to purchase the Steuben County property under the terms of the lease. After this conversation, Justice continued to make capital improvements on the Steuben County property.

In September 2004, Justice submitted a letter to exercise his option to purchase the land, which was refused by Calvary Temple due to the pending foreclosure action. Justice then contacted AGF regarding the option to purchase. On November 23, 2004, Parsley sent Justice an e-mail stating, "Our loan committee wants us to obtain the property and sell it to you ASAP, which we intend to do, honoring the original price." Appellant's App. p. 74. Based on this statement, Justice decided to continue operating the campground on the Steuben County property. During the winter months, on average Justice operated the camp at an average loss of $20,000 per month.

On November 29, 2004, AGF filed a Complaint on Account and Foreclosure of Real Estate Mortgage on the Steuben County Property. The complaint named all necessary parties with subordinate interests, including CPM and Justice. On February 23, 2005, CPM and Justice filed their Answer, Affirmative Defenses, and Counterclaim. In their answer, CPM and Justice contended that under the theory of promissory estoppel, AGF should be estopped from denying an agreement between the parties that AGF would allow CPM to exercise its option to purchase. They also argued that AGF should not be unjustly enriched by the capital improvements CPM had made on the property.

AGF also filed for foreclosure on the Allen County property. On July 25, 2005, the Allen Superior Court entered a Decree of Foreclosure for AGF on the Allen County property, granting it a judgment against Calvary Temple in the amount of $5,543,961.90. AGF bought the Allen County property at a sheriff's auction on October 13, 2005, for the sum of $2.5 million. After the sale, the amount remaining on AGF's judgment, plus accrued interest and reasonable attorney's fees, was more than $3 million, which was still secured by the Steuben County property.

On December 22, 2005, AGF filed a motion for summary judgment regarding the Steuben County property, seeking a judgment against Calvary Temple for the remaining balance of $3,140,961.63. CPM and Justice filed a memorandum in opposition to AGF's motion for summary judgment on January 27, 2006. The trial court held a hearing on February 10, 2006, and granted AGF's summary judgment motion on the following February 16. In its order, the trial court found that Justice and CPM's lease interest was inferior to AGF's mortgage. The trial court foreclosed on all liens and claims of interest in the Steuben County property, granting a judgment in favor of AGF in the amount of $3,140,961.63. The trial court also gave AGF the right to credit bid at the foreclosure sale, meaning that in the event AGF successfully bid on the Steuben County property at auction, it would have deducted the amount it paid for the property from its judgment against Calvary Temple. However, AGF was not the successful bidder at the sheriff's auction, and on May 25, 2006, another bidder bought the property for $2.8 million. CPM and Justice now appeal their claims of promissory estoppel and unjust enrichment. Additional facts will be provided as necessary.

Discussion and Decision

Initially, we note that this is an appeal from a trial court's order of summary judgment. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C) (2006). When reviewing a grant of summary judgment, we apply the same standard as does the trial court. Rogier v. Am. Testing & Eng'g Corp., 734 N.E.2d 606, 613 (Ind. Ct. App. 2000), trans. denied. We do not reweigh the evidence; rather, we consider the facts in the light most favorable to the non-movant. Id.

Our review is limited to those materials that the parties designated to the trial courts. Cummins v. McIntosh, 845 N.E.2d 1097, 1102 (Ind. Ct. App. 2006), trans. denied. Neither the trial court nor the reviewing court may look beyond the evidence specifically designated to the trial court. McDonald v. Lattire, 844 N.E.2d 206, 210 (Ind. Ct. App. 2006). While the non-movant bears the burden of demonstrating that the grant of summary judgment was erroneous, we carefully assess the trial court's decision to ensure that the non-movant was not wrongly denied his or her day in court. Kennedy v. Guess, Inc. 806 N.E.2d 776, 779 (Ind. 2004).

A party seeking summary judgment bears the burden to make a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. Once the moving party satisfies this burden through evidence designated to the trial court pursuant to Trial Rule 56, the nonmoving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial. McDonald, 844 N.E.2d at 210.

I. Promissory Estoppel

CPM and Justice contend that AGF should be estopped from denying its promise to sell the Steuben County property according to the lease agreement because it induced CPM and Justice to rely on the promise to their detriment. Normally an oral promise to convey land is unenforceable due to the Statute of Frauds. The Indiana Statute of Frauds provides:

> A person may not bring any of the following actions unless the promise, contract, or agreement on which the action is based, or a memorandum or note describing the promise, contract, or agreement on which the action is based, is in writing and signed by the party against whom the action is brought or by the party's authorized agent: **. . .** (4) An action involving any contract for the sale of land.

Ind. Code § 32-21-1-1 (2002).

However, when a party has reasonably relied on such a promise, the promise may be enforced under the doctrine of promissory estoppel. Brown v. Branch, 758 N.E.2d 48, 51 (Ind. 2001). Estoppel is a judicial doctrine sounding in equity. Id. There are a variety of estoppel doctrines, including estoppel by deed, collateral estoppel, equitable estoppel, judicial estoppel, and promissory estoppel. Id. at 52. Our supreme court has defined estoppel as a "concept by which one's own acts or conduct prevents the claiming of a right to the detriment of another party who was entitled to and did rely on the conduct." Id. Estoppel is based on the underlying principle that "one who by deed or conduct has induced another to act in a particular manner will not be permitted to adopt an inconsistent position, attitude, or course of conduct that causes injury to such other." Id.

In order to establish promissory estoppel and remove the promise from the operation of the Statute of Frauds, a plaintiff must prove five elements:

> (1) a promise by the promissor; (2) made with the expectation that the promisee will rely thereon; (3) which induces reasonable reliance by the promisee; (4) of a definite and substantial nature; and (5) injustice can be avoided only by enforcement of the promise.

Id. Furthermore, the plaintiff must demonstrate "that the other party's refusal to carry out the terms of the agreement has resulted not merely in a denial of the rights which the agreement was intended to confer, but the infliction of an unjust and unconscionable injury and loss." Id. This reliance injury must be "so substantial and independent as to constitute an unjust and unconscionable injury and loss" in order to remove the claim from the operation of the Statute of Frauds. Id. In Brown, our supreme court held that "[i]f what the party gave up in reliance on an oral promise was no greater than what the party would have given up in any event, then the consideration is deemed insufficient to remove the oral promise from the operation of the Statute of Frauds." Id.

Justice and CPM contend that they were unjustly and unconscionably injured as AGF's promise to sell them the Steuben County property induced them to expend $600,000 on capital improvements to the property. As we are reviewing an order granting summary judgment, we review the record in a light favorable to the non-movants, Justice and CPM. Thus, for purposes of review we assume that AGF made the statements about intending to sell the property to CPM and Justice.

However, we are also compelled to note that under paragraphs four and seven of the lease agreement CPM and Justice were *required* to expend ninety percent (90%) of their escrowed rent on capital improvements to the property. Appellant's App. pp. 46, 49-50. In fact, the lease provides that failure to do so would have been a default. Because under the lease agreement Justice and CPM would have been required to pay for

these capital expenditures regardless of AGF's perceived promise, they have not given up anything greater than what they would have given up had the foreclosure not occurred. This is not evidence of an "infliction of an unjust and unconscionable injury and loss" sufficient to remove the promise from the operation of the Statute of Frauds.

Justice and CPM next claim that AGF's promise to sell them the Steuben County property induced them to continue operating the camp during the winter months at a loss of about $20,000 a month. Our court held in Whiteco Industries, Inc. v. Kopani that "neither the actions involved in moving one's household to a new location nor the mere relinquishment of an existing employment are sufficient to constitute *independent* consideration." 514 N.E.2d 840, 843-844 (Ind. Ct. App. 1987) (emphasis added). We observed that the employer in Whiteco, who allegedly promised to employ the plaintiff, did not receive an independent benefit by the plaintiff's moving his household to a different location. Id. We noted that the "factors relied on [must] possess the quality of those which courts have found sufficient to constitute an independent consideration." Id. at 844. "It is only where a different and substantial detriment is incurred such as releasing a claim for personal injuries or assignment of a lease to the employer that separate consideration has been found to exist." Id. In the case before us, considering all the facts in a light most favorable to Justice and CPM, we find no evidence that AGF received any benefit from Justice and CPM continuing to operate the campground. Furthermore, we note that Justice and AGF's mere continuance of operating a camp that had been in operation for several years did not constitute a change in circumstances, and

therefore we cannot find any evidence presented of a "different and substantial detriment."

Promissory estoppel is an equitable concept whose objective is to avoid injustice and cannot properly be employed to award damages for a mere breach of contract. While the facts may demonstrate that Justice and CPM were inconvenienced and denied the benefit of the promise that AGF made to sell them the property, they do not establish that Justice and CPM were induced to make capital improvements to the property or to continue operating the campgrounds to their detriment. Therefore, Justice and CPM have failed to present evidence that they were induced by AGF's oral promise or that AGF made the promise with the expectation that it would be relied on. See Brown, 758 N.E.2d at 52. Accordingly, as a matter of law they cannot demonstrate an "infliction of an unjust and unconscionable injury and loss" that would remove the promise from the operation of the Statute of Frauds.

II. Unjust Enrichment

Justice and CPM next contend that because they were not compensated for the capital improvements that they made on the Steuben County property, AGF has been unjustly enriched by the foreclosure. As we have previously noted, foreclosure actions are equitable in nature. First Fed. Sav. Bank v. Hartley, 799 N.E.2d 36, 40 (Ind. Ct. App. 2003). However, notwithstanding equity's influences, "rules of law obviously guide the foreclosure process." Id. "Moreover, 'where substantial justice can be accomplished by following the law, and the parties' actions are clearly governed by the rules of law, equity

follows the law.'" Id. (quoting Lake County Auditor v. Bank Calumet, 785 N.E.2d 279, 281 (Ind. Ct. App. 2003)).

Indiana Code section 32-21-4-1(b) (2002 & Supp. 2003) provides, "[a] conveyance, mortgage, or lease takes priority according to the time of its filing." In this case, AGF recorded its mortgage interest before Justice and CPM recorded their lease interest. Because AGF recorded first, Indiana law dictates that AGF's mortgage interest has priority over the lease. Since Justice and CPM made the capital improvements to the property under their lease with Calvary Temple, AGF's mortgage interest trumps their subsequent claim for improvements. In First Federal Savings Bank, we similarly concluded that a bank's mortgage interest took priority over the improvements that plaintiffs made under a land contract. We noted,

> [w]hile we sympathize with the [plaintiff's] situation, we note that their remedies, if any, lie in (1) an action against [the seller of the real estate], and (2) the possibility that the improved property will sell for a price high enough to pay off the Bank first and still leave sufficient funds to reimburse them.

799 N.E.2d at 42.

Here, we likewise conclude that Justice and CPM do not have a claim against AGF for unjust enrichment because their interest was subordinate. However, the provisions of the lease may give CPM a remedy against Calvary Temple. Specifically, paragraph 16 of the lease addresses the issue of foreclosure by providing that "Lessor shall indemnify Lessee from and against any loss, damage, claim or suit, including reasonable attorney's fees, arising from the foreclosure." Appellant's App. p. 52.

From the record, it is clear that Justice and CPM were aware of AGF's superior mortgage on the property and therefore were on notice that their interest was subordinate to the mortgage. Furthermore, paragraph 15(a) of their lease agreement with Calvary Temple stated that the lease was subordinate to any existing mortgage on the property. Appellant's App. p. 51. The lease also provided that Lessee had the right to possession of the premises "if this Lease is in full force and effect." Id. at 51. During the foreclosure proceeding, this lease interest was foreclosed, and no longer in "full force and effect." Consequently, CPM and Justice were no longer entitled to possession of the property or anything attached to the property. We therefore conclude as a matter of law that AGF's mortgage interest on the Steuben County property had priority over Justice and CPM's interest in the capital improvements they made to the property pursuant to their lease agreement. The trial court properly granted AGF's motion for summary judgment on the issue of unjust enrichment.

Conclusion

The trial court properly granted summary judgment in favor of AGF.

Affirmed.

KIRSCH, C. J., and SHARPNACK, J., concur.