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IN THE
COURT OF APPEALS OF INDIANA

RUDOLFO RODRIGUEZ,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 76A03-1101-PL-36
	)	
LAKEVIEW TITLE, LLC.,	)	
	)	
Appellee.	)	

APPEAL FROM THE STEUBEN SUPERIOR COURT
The Honorable William C. Fee, Judge
Cause No. 76D01-0812-PL-957

July 27, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Rudolfo Rodriguez, Jr., appeals the trial court's grant of summary judgment to Lakeview Title, LLC ("Lakeview") and trial court's denial of his motion for summary judgment. We affirm.

Issue

Rodriguez raises two issues, which we consolidate and restate as whether the trial court properly granted Lakeview's motion for summary judgment and properly denied Rodriguez's motion for summary judgment.

Facts

Rodriguez entered into a purchase agreement with Richard Williams to sell his property located in Angola. Monument Mortgage of Angola was the mortgage loan broker for Williams, and the mortgagee was North Pointe Bank. At the request of Monument Mortgage, Lakeview began preparing a title insurance commitment for the benefit of Williams and North Pointe Bank. In preparing the title insurance commitment, Lakeview subcontracted with Rainbow Searchers, Inc., for a title search on Rodriguez's property, and Rainbow then subcontracted with Roberta Deem, an independent abstractor, for the title search. Deem's search did not reveal any unpaid property taxes on Rodriguez's property. Lakeview then prepared a title insurance commitment as a condition precedent to the issuance of an Owner's Policy by Conestoga Title Insurance Company with Williams as the proposed insured and a Lender/Loan Policy by Conestoga Title Insurance Company with North Pointe Bank as the proposed insured.

At the closing on December 6, 2006, Rodriguez asked Lakeview's closing agent, Jodi Getz, if the property taxes were paid, and she responded that they were current. Rodriguez signed an Owner's Affidavit in which he averred that there were no unpaid property taxes or tax liens affecting the property. Rodriguez also signed a Vendor's Closing Affidavit in which he warranted under oath:

> At the time of delivery of the Deed to the Grantee, Grantor has fee simple marketable title to the Real Estate; and the Real Estate is free and clear of all taxes, liens, encumbrances, assessments, charges or leases of whatsoever, kind or nature, except those shown in the Title Commitment, easements (visible or of record), and matters affecting the Real Estate disclosed in the Deed.

Appellant's App. p. A-192. The HUD Settlement Statement, which was signed by Rodriguez, showed that title insurance costs of $380.00 were paid to Conestoga Title Insurance Company and closing fee and title search charges of $200 were paid to Lakeview out of Rodriguez's funds at closing. The Settlement Statement also showed that taxes due in 2005 and payable in 2006 had already been paid. Rodriguez conveyed the property to Williams by warranty deed, and Rodriguez received $75,957.17 from the sale.

Lakeview later learned that the property had been sold at a tax sale on September 29, 2006, as a result of unpaid property taxes. The Steuben County Auditor's Office had mailed a notice of tax sale to Rodriguez on August 2, 2006. Lakeview paid the redemption amount of $3,685.79. Deem later wrote a check to Rainbow, and Rainbow reimbursed Lakeview for the $3,685.79 it had paid to redeem the property.

In April 2007, Rainbow filed a notice of claim against Rodriguez in small claims court, and the small claims court entered a judgment against Rodriguez. Rodriguez appealed the judgment, and this court held that Rainbow did not have standing because it had not suffered any financial injury or claim against it. We reversed the judgment and remanded to the small claims court for it to consider Rodriguez's request for attorney fees pursuant to Indiana Code Section 34-52-1-1. See Rodriguez v. Rainbow Searchers, Inc., No. 76A03-0807-CV-336 (Ind. Ct. App. Feb. 13, 2009). On remand, the small claims court denied Rodriguez's request for attorney fees. Rodriguez appealed again, and we affirmed the small claims court's denial of his request for attorney fees. See Rodriguez v. Rainbow Searchers, Inc., No. 76A03-0905-CV-202 (Ind. Ct. App. Sept. 30, 2009).

Rodriguez filed a complaint against Lakeview on December 2, 2008, for negligence and unjust enrichment. Rodriguez alleged that "in reliance upon representations made by Lakeview at closing, Plaintiff proceeded to close, but has since been sued, suffered damages . . . ." Appellant's App. p. A-4.

In March 2010, Rodriguez filed a motion for summary judgment. He argued that he was entitled to reimbursement from Lakeview for his attorney fees incurred in defending himself in the action filed against him by Rainbow. Rodriguez argued that his action against Lakeview was both an action for breach of contract and negligence "in that the negligence arises out of a contract for professional services that were breached." Id. at A-17.

Lakeview filed a cross motion for summary judgment. Lakeview argued that: (1) Rodriguez's claim for negligence was barred by the statute of limitations; (2) his

negligence claim failed as a matter of law because Lakeview had no duty to Rodriguez; (3) his unjust enrichment claim failed because Rodriguez has unclean hands and could not seek equitable relief; and (4) his unjust enrichment claim failed because there was "no privity between the parties pertaining to Lakeview's acts or omissions." Id. at A-106.

Rodriguez filed a response to Lakeview's cross motion for summary judgment. He argued that the statute of limitations defense was unavailable to Lakeview because it had failed to plead it in its affirmative defenses. Rodriguez also argued that the statute of limitations did not begin running until the December 6, 2006 closing occurred. He also argued that Lakeview owed a duty to him because, as shown on the HUD Settlement Statement, he paid Lakeview for the title insurance policy[1] and Lakeview's representative answered his questions at closing regarding whether any property taxes were due. Rodriguez also argued that a duty should be imposed on Lakeview based on its affirmative conduct or based on his status as a third-party beneficiary of the insurance policy. Rodriguez also filed a motion to strike portions of an affidavit by Beth Beech, attorney for Lakeview, which was designated by Lakeview.

On July 2, 2010, Lakeview filed a motion for leave to file an amended answer to include affirmative defenses, including a statute of limitations defense. The trial court granted Lakeview's motion over Rodriguez's objection.

After an August 2010 hearing, the trial court denied Rodriguez's motion to strike, found no genuine issues of material fact, granted Lakeview's motion for summary

[1] Actually, the HUD Settlement Statement shows that Rodriguez paid Conestoga Title Insurance Company for the title insurance policies.

judgment, and denied Rodriguez's motion for summary judgment. Rodriguez now appeals.

Analysis

The issue is whether the trial court properly granted Lakeview's motion for summary judgment and properly denied Rodriguez's motion for summary judgment.[2] Our standard of review for summary judgment is the same standard used by the trial court: summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Sheehan Constr. Co. v. Cont'l Cas. Co., 938 N.E.2d 685, 688 (Ind. 2010). All facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party. Sheehan, 938 N.E.2d at 688. Also, review of a summary judgment motion is limited to those materials designated to the trial court. Id.

Once the moving party has sustained its initial burden of proving the absence of a genuine issue of material fact and the appropriateness of judgment as a matter of law, the party opposing summary judgment must respond by designating specific facts establishing a genuine issue for trial. Id. at 689. If the opposing party fails to meet its responsive burden, the court shall render summary judgment. Id. The fact that the parties made cross-motions for summary judgment does not alter our standard of review.

[2] Rodriguez seems to question the trial court's lack of findings of fact or explanation for its judgment. Where a trial court enters findings of fact and conclusions thereon in granting a motion for summary judgment, the entry of specific findings and conclusions does not alter the nature of our review. Rice v. Strunk, 670 N.E.2d 1280, 1283 (Ind. 1996). In the summary judgment context, however, we are not bound by the trial court's specific findings of fact and conclusions thereon. Id. They merely aid our review by providing us with a statement of reasons for the trial court's actions. Id. It was not necessary for the trial court to make special findings of fact or conclusions here.

Hartford Acc. & Indem. Co. v. Dana Corp., 690 N.E.2d 285, 291 (Ind. Ct. App. 1997), trans. denied. Instead, we must consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law. Id.

We begin by noting that, throughout his appellate briefs, Rodriguez claims that he has stated both a breach of contract and negligence claim against Lakeview. His complaint, however, alleged only negligence and unjust enrichment claims. Moreover, regarding his alleged breach of contract claim, Rodriguez only designated evidence that, according to the HUD Settlement Statement, he paid the title insurance, title search, and closing costs out of the proceeds of the sale of his property. It is undisputed, however, that Lakeview was contacted regarding the sale of the property by Monument Mortgage. Rodriguez's first contact with Lakeview was during the closing. In fact, Lakeview designated evidence that it did not enter into any agreement with Rodriguez "pertaining to the search of the records, issuance of the Title Commitment or issuance of the Title Insurance Policy." Appellant's App. p. A-127. We conclude that Rodriguez designated no evidence of a contract between himself and Lakeview.

As for Rodriguez's negligence claim, after the parties fully briefed their summary judgment motions but before the hearing and the trial court's order, our supreme court decided U.S. Bank, N.A., v. Integrity Land Title Corp., 929 N.E.2d 742 (Ind. 2010), upon which Rodriguez now relies in support of his negligence claim.[3] In Integrity, a buyer of

[3] In his response to Lakeview's motion for summary judgment, Rodriguez relied upon U.S. Bank v. Integrity Land Title Co., 907 N.E.2d 616 (Ind. Ct. App. 2009), which was later vacated by our supreme court.

real property secured a mortgage loan from Texcorp Mortgage Bankers, and Integrity Land Title prepared a title commitment and conducted the closing at Texcorp's request. Integrity conducted a title search, which revealed no judgments against the sellers. Integrity's title search failed to reveal a 1998 foreclosure judgment on the property. Southern National Title Insurance Corporation issued and underwrote a mortgage insurance policy naming Texcorp and its successors and/or assigns as the insured. The foreclosure judgment holder later filed an action against the owner of the property and Texcorp. U.S. Bank succeeded Texcorp's interests, intervened in the action, and filed a third-party claim against Integrity and Southern for breach of contract and negligence.

On appeal, our supreme court adopted Integrity's position that it was not in contractual privity with U.S. Bank.[4] The court noted that, if there were a contract, "the parties in all likelihood would be relegated to their contractual remedies." Integrity, 929 N.E.2d at 745.

As for the negligence claim, our supreme court recognized that, in the context of the title insurance industry, "Indiana courts have shown a willingness to go beyond the terms of the insurance contract to explore whether a duty might lie in tort as well as contract." Id. at 748. The court relied on the Restatement (Second) of Torts § 552(1), entitled Information Negligently Supplied for the Guidance of Others, which provides:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance

[4] Southern, the party with which U.S. Bank had contractual privity, was dissolved, rendering it unavailable as a source of relief for U.S. Bank. Integrity, 929 N.E.2d at 744 n.3.

> of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Integrity, 929 N.E.2d at 747. Further, the court noted that "[a] professional may owe a duty to a third party with whom the professional has no contractual relationship, but the professional must have actual knowledge that such third person will rely on his professional opinion." Id. The court allowed U.S. Bank's tort claim against Integrity to go forward and, thus, recognized "a claim of negligent misrepresentation as an exception to the general economic loss rule[5] where a mortgage lender not in privity of contract with a title company seeks to recover for the title company's negligence in issuing a title commitment that failed to disclose an encumbrance." Indianapolis-Marion County Pub. Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722, 741 (Ind. 2010) (citing Integrity, 929 N.E.2d at 748-49).

Rodriguez argues that Integrity controls here, but Lakeview argues that Integrity is inapplicable because Rodriguez was the seller of the property rather than the mortgagee as in Integrity. However, our supreme court did not limit the negligent misrepresentation claim in Integrity to a mortgagee. Rather, Integrity required only that the third party have

[5] "[T]he economic loss rule provides that a defendant is not liable under a tort theory for any purely economic loss caused by its negligence (including, in the case of a defective product or service, damage to the product or service itself)—but that a defendant is liable under a tort theory for a plaintiff's losses if a defective product or service causes personal injury or damage to property other than the product or service itself." Indianapolis-Marion County Pub. Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722, 729 (Ind. 2010).

justifiably relied upon the information and that the professional have actual knowledge that the third person would rely on the information.

The reasonableness of a plaintiff's reliance is usually a question for the trier of fact, but the reasonableness of reliance can in some circumstances be determined as a matter of law. Allen v. Great Am. Reserve Ins. Co., 766 N.E.2d 1157, 1164 (Ind. 2002). Where the evidence is susceptible to only one interpretation, it is for the court to determine as a matter of law whether plaintiff was justified in relying on the representation. Wright v. Pennamped, 657 N.E.2d 1223, 1231 (Ind. Ct. App. 1995), decision clarified on denial of reh'g, 664 N.E.2d 394 (Ind. Ct. App. 1996), trans. denied.

Here, the information at issue is Lakeview's statement to Rodriguez at the December 6, 2006, closing that the property taxes were current. In actuality, Rodriguez had failed to pay the taxes, and the property had already been sold at a tax sale on September 29, 2006. It is undisputed that Rodriguez lived at the property in question and that notice of the tax sale was sent to the property. Rodriguez makes no argument that the notices of the delinquent taxes or tax sale were improper in any way. Rather, Rodriguez argues that "[e]ven if he knew or suspected that at one time in the past there may have been some tax issue," he was entitled to rely on Lakeview's representation at the closing.[6] Appellant's Br. p. 20.

[6] Rodriguez also relies upon Filip v. Block, 879 N.E.2d 1076 (Ind. 2008), which held that "reasonable reliance upon an agent's representations can override an insured's duty to read the policy." Filip concerned an insured's duty to read part of a policy if an agent insists that a particular hazard will be covered. Filip, 879 N.E.2d at 1084. We do not find Filip persuasive in this circumstance. Whether Rodriguez's reliance on Lakeview's representations was justifiable depended, not on differences between a policy and the representations, but on differences between Rodriguez's knowledge and the representations.

We conclude that whether Rodriguez was justified in relying on Lakeview's representation is a matter susceptible to only one interpretation. Given Rodriguez's failure to challenge the propriety of the tax sale notices, he knew or should have known that Lakeview's representation regarding the delinquent taxes was incorrect. Rodriguez designated no evidence that his reliance on Lakeview's representation was justified. As a result, Lakeview was entitled to summary judgment on Rodriguez's negligent misrepresentation claim.

Rodriguez also argues that he had a valid claim for unjust enrichment. A claim for unjust enrichment "is a legal fiction invented by the common law courts in order to permit a recovery . . . where the circumstances are such that under the law of natural and immutable justice there should be a recovery . . . ." Zoeller v. E. Chicago Second Century, Inc., 904 N.E.2d 213, 220 (Ind. 2009) (quoting Bayh v. Sonnenburg, 573 N.E.2d 398, 408 (Ind. 1991), cert. denied). "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." Id. (quoting Restatement of Restitution § 1 (1937)). "To prevail on a claim of unjust enrichment, a claimant must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust." Id. (citing Bayh, 573 N.E.2d at 408).

Rodriguez claims that Lakeview was unjustly enriched because he paid fees to Lakeview and he received "improper or worthless service or advice that caused him damage . . . ." Appellant's Br. p. 18. Lakeview claims that Rodriguez was the party

unjustly enriched because he did not pay his property taxes and its subcontractor paid the redemption amount.

The designated evidence does not show that Lakeview was unjustly enriched at the expense of Rodriguez. The title search, title insurance commitment, and title insurance policies were for the benefit of Williams and North Pointe Bank, not Rodriguez. Further, Lakeview provided the requested services, although the title search missed the delinquent taxes and tax sale. Deem, not Rodriguez, paid for Rodriguez's delinquent taxes. Rodriguez cannot transform his failed attempt to collect attorney fees from Rainbow into an unjust enrichment claim against Lakeview. Rodriguez failed to demonstrate that a measurable benefit was conferred on Lakeview under such circumstances that Lakeview's retention of the benefit without payment would be unjust. Simply put, this is not the stuff of which unjust enrichment is made.[7]

Conclusion

The trial court properly denied Rodriguez's motion for summary judgment and properly granted Lakeview's motion for summary judgment. We affirm.

Affirmed.

RILEY, J., and DARDEN, J., concur.

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[7] Because Rodriguez's claims fail, we need not address his argument that he is entitled to receive damages for his attorney fees in the Rainbow actions, that he filed his action against Lakeview within the statute of limitations, or that the trial court abused its discretion by allowing Lakeview to amend its affirmative defenses to add a statute of limitations defense.

Rodriguez also argues that the trial court erred by relying on improper hearsay and other legal conclusions in the affidavit of Beth Beech. Rodriguez does not develop the argument by identifying the allegedly improper portions of the affidavit or explaining why the statements were inadmissible. As a result, Rodriguez has waived this issue for failure to make a cogent argument. See Ind. Appellate Rule 46(A)(8)(a); Illinois Bulk Carrier v. Jackson, 908 N.E.2d 248, 262 n.7 (Ind. Ct. App. 2009), trans. denied.