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IN THE
COURT OF APPEALS OF INDIANA

KENNETH MITAN,	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	No. 53A01-0912-CV-612
	)	
RICHARD E. DECKARD FAMILY LIMITED PARTNERSHIP #206,	)	
	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable E. Michael Hoff, Judge
The Honorable Susan H. Nelson, Judge *Pro Tempore*
Cause No. 53C01-0901-MF-81

November 4, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Kenneth Mitan appeals from the trial court's grant of summary judgment in favor of Appellee/Plaintiff the Richard E. Deckard Family Limited Partnership #206 ("the Partnership"). Concluding that Mitan was a proper party to the land contract in question and that the trial court erred in awarding all personal property within the real property in question to the Partnership, we affirm in part, reverse in part, and remand with instructions.

FACTS

On March 10, 2001, the Partnership entered into a sales contract for real property located in Monroe County with Mitan and Mitan Estates, Inc. ("MEI"). The contract was signed twice by Mitan, once on behalf of MEI and once in his individual capacity. *Inter alia*, the contract provided that

> The purchase price shall include all improvements, built-in appliances, accessories, attached floor coverings, curtain and drapery hardware, attached fire and security alarm systems, television tower, rotor and antennas, and all articles which are so attached or built in, the removal of which would leave the premises in an incomplete or unfinished condition as to exterior or interior appearance. In addition, the sale of this property shall include the following personal property: dishwasher, disposal, alarm, 40 gallon gas water heater, and gas fireplace.

Appellant's App. p. 29.

On January 12, 2009, the Partnership filed suit against Mitan, alleging that he had failed to timely make payments under the contract and had diminished the value of the real property and seeking forfeiture. On June 17, 2009, the Partnership filed a summary judgment motion, to which Mitan responded on July 20, 2009. In neither the Partnership's complaint nor its summary judgment motion did it request repossession of

all personal property situated within the real property. On September 17, 2009, following a hearing, the trial court granted summary judgment in favor of the Partnership, awarding the Partnership possession of the real estate and any personal property therein, $3600.00 in attorney fees, and the costs of the action. On October 14, 2009, Mitan filed a motion to correct error, in which, *inter alia*, he challenged the trial court's award of all personal property within the real estate to the Partnership and which was deemed denied by operation of rule on November 28, 2009.

DISCUSSION AND DECISION

When reviewing the grant or denial of a summary judgment motion, we apply the same standard as the trial court. *Merchs. Nat'l Bank v. Simrell's Sports Bar & Grill, Inc.*, 741 N.E.2d 383, 386 (Ind. Ct. App. 2000). Summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id.*; Ind. Trial Rule 56(C). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmoving party. *Id*. To prevail on a motion for summary judgment, a party must demonstrate that the undisputed material facts negate at least one element of the other party's claim. *Id*. Once the moving party has met this burden with a prima facie showing, the burden shifts to the nonmoving party to establish that a genuine issue does in fact exist. *Id*. The party appealing the summary judgment bears the burden of persuading us that the trial court erred. *Id*.

As an initial matter, we note that Mitan raised several of his challenges for the first time in his motion to correct error. "A party may not raise an issue for the first time in

her motion to correct errors or on appeal." *Matter of S.L.*, 599 N.E.2d 227, 229 (Ind. Ct. App. 1992). As such, Mitan's claims regarding whether the trial court properly concluded that he had abandoned the property and whether MEI should have been joined as a necessary party to the action are waived for appellate review. The only issue raised and argued in Mitan's response to and brief in opposition to the Partnership's summary judgment motion was that of whether he was a party to the original sales contract and so we address it. Moreover, we address the question of whether the trial court properly awarded all personal property within the real estate to the partnership, as the first time the question arose was in the trial court's order on summary judgment. Since the Partnership never requested possession of all personal property, Mitan could not have been expected to address the question until the trial court raised it. Under the circumstances of how this particular issue was handled, application of the general waiver rule would be unfair.

I. Whether Mitan was a Party to the Contract

"Ordinarily when we interpret the language of agreements or contracts, if the language is clear and unambiguous, it must be given its plain and ordinary meaning." *Cabanaw v. Cabanaw*, 648 N.E.2d 694, 697 (Ind. Ct. App. 1995). Here, the land contract was signed by Mitan "On Behalf of Mitan Estates, Inc." and as an individual. Appellant's App. p. 31. The only reasonable interpretation of this is that the parties intended Mitan to be bound individually by the terms of the land contract in addition to MEI. In *Speed v. Old Fort Supply Co.*, 737 N.E.2d 1217, 1219 (Ind. Ct. App. 2000), we concluded that the signer of a credit application was bound by its terms when it did not explicitly indicate that he was signing in his corporate capacity. Here, if anything, the

facts even more strongly support the conclusion that Mitan intended to be bound as an individual, as he signed the land contract twice, once explicitly in his corporate capacity and once as an individual. The trial court did not err in concluding, as a matter of law, that Mitan was a proper party to the Partnership's forfeiture action.

II. Whether the Trial Court Erroneously Awarded All Personal Property Within the Real Estate to the Partnership

Mitan contends that the trial court erred in awarding all personal property within the real estate to the partnership. We agree. The contract specified that the only items of personal property to be included in the sale were the following: "dishwasher, disposal, alarm, 40 gallon gas water heater, and gas fireplace." Appellant's App. p. 29. As such, the enumerated items are the only items of personal property to which the Partnership is entitled. We reverse the trial court's award of all personal property and remand with instructions to award to the Partnership only that personal property specified by the contract as being included in the sale.

We affirm the judgment of the trial court in part, reverse in part, and remand with instructions.

DARDEN, J., and BROWN, J., concur.