ATTORNEYS FOR APPELLANT

Bryan H. Babb
Bradley M. Dick
Bose McKinney & Evans LLP
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES

Angela M. Jones
The Law Office of Angela M. Jones
St. John, Indiana

Maggie L. Smith
Frost Brown Todd LLC
Indianapolis, Indiana

Kimberly P. Peil
Hoeppner Wagner & Evans LLP
Merrillville, Indiana

Andrew T. Shupp
Hoeppner Wagner & Evans LLP
Valparaiso, Indiana

IN THE

COURT OF APPEALS OF INDIANA

Munster Steel Co., Inc.,
Appellant-Plaintiff,

v.

CPV Partners, LLC and Centennial Village, LLC,
Appellees-Defendants.

March 28, 2022

Court of Appeals Case No. 21A-PL-1154

Appeal from the Lake Superior Court

The Honorable Bruce D. Parent, Judge

Trial Court Cause No. 45D11-1702-PL-16

Bradford, Chief Judge.

Case Summary

[1] Munster Steel Co., Inc. ("Munster Steel") owned the Munster Steel Property ("the Property") in Munster. In 2011, Munster Steel entered into a real estate sale contract ("Real Estate Contract") with CPV Partners, LLC and Centennial Village, LLC (collectively "the Developer") to sell the Property. The Real Estate Contract contained a provision in case of a subsequent sale ("Subsequent Sale Provision") which required the Developer to pay a fee to Munster Steel if the Developer resold the Property within two years following the closing of the Real Estate Contract. In 2013, the Munster Redevelopment Commission, Munster Development Commission, and the Town of Munster ("the Town Parties"), entered into an agreement ("the Development Agreement") with the Developer to develop "Centennial Village," which would be comprised of, in part, the Property. In 2017, Munster Steel sued the Developer, claiming that

the transfer of the Property between the Developer and the Town Parties had triggered the Subsequent Sale Provision. Ultimately, the trial court entered summary judgment, determining that the transfer between the Developer and the Town had not been a sale, but an equitable mortgage. Munster Steel appeals, arguing that because the Development Agreement was ambiguous, we may look to extrinsic evidence to determine that the Developer sold the Property to the Town Parties. The Developer argues that it intended the transfer of the Property to be an equitable mortgage and that Munster Steel has waived the argument that the Development Agreement was ambiguous. Because Munster Steel has waived any argument that the Development Agreement was ambiguous and the evidence available to us shows that the Town Parties and the Developer intended the transfer to be an equitable mortgage, we affirm.

Facts and Procedural History

[2] Munster Steel owned the Property in Munster. The Property had frontage on Calumet Avenue and contained a one-story office building and a two-story construction building, in which Munster Steel conducted its operations. In 2011, Munster Steel entered into the Real Estate Contract to sell the property to the Developer, but the sale did not actually occur until 2014.

[3] In 2013, the Town Parties determined that a redevelopment project would be in the best interest of Munster residents, creating the Ridge Road Calumet Avenue Economic Development Area in accordance with Indiana Code Chapter 36-7-

14. Indiana Code Chapter 36-7-14 provides that local governments may establish "redevelopment commissions" with the jurisdiction to create special taxing districts known as "Economic Development Areas" to attract new investments and promote employment opportunities for county residents.

[4] The Real Estate Contract between Munster Steel and the Developer contained a Subsequent Sale Provision which, in pertinent part, provided:

> If the [Developer], or any of [its] affiliates enters into contract for sale of all or one or more portions of the Property in one or more transactions ("Subsequent Sale") within two (2) years of the date of the closing of this transaction, then the [Developer] will pay Subsequent Fee to [Munster Steel] at the time of the closing of each Subsequent Sale. Notwithstanding anything in the foregoing sentence to the contrary, there shall not be Subsequent Sale if there is no or only nominal (less than $100) consideration passing between [the Developer] and transferee entity and the majority owner (i.e. shareholder or unit owner) of the [Developer] and the transferee entity shall be one and the same. The Subsequent Fee shall be based upon the gross sales price no matter when paid to the Buyer. For purposes of calculating the Subsequent Fee due to [Munster Steel] there shall not be any deductions for broker fees, closing costs, prorations, etc[.] from the sales price.

Appellant's App. Vol. II p. 46. On September 5, 2013, the Town Parties entered into an agreement with the Developer to redevelop the Economic Development Area into Centennial Village. Centennial Village was to consist of a "mixed-use walkable Life Style Center with 233,400 square foot retail/commercial, 150 residential condominiums and 22 townhouses plus an 80 room limited service hotel and includes 1,103 above grade parking spaces in

addition to the 206 underground parking spaces[.]" Appellant's App. Vol. II p. 100. A portion of Centennial Village was to consist of the Property, which the Developer had purchased from Munster Steel in the Real Estate Contract. The Development Agreement, in pertinent part, provided:

> C. [The Town Parties] desire to stimulate and promote economic development activities in or about the Ridge Road Calumet Avenue Economic Development Area (the "Area");
>
> D. The Developer has acquired or will acquire certain real estate located in the Area and has submitted to the Town Parties a proposal for the $70-$100 million development of such real estate, as more specifically set forth as Exhibit A hereto (the "Development"), which amount includes the Cash Incentive (as hereafter defined);
>
> . . . .
>
> F. The Town Parties desire to induce the Developer to proceed with the Developer Project in the Town by providing the Developer financial incentive in an amount not in excess of Fourteen Million Two Hundred Thousand Dollars ($14,200,000) to be applied to the cost of the Public Infrastructure Project (the "Cash Incentive") and ten (10) year tax abatement for owner—occupied condominiums and owner-occupied condominiums and owner-occupied town homes to be constructed as part of the Developer Project (the "Tax Incentive" and, collectively with the Cash Incentive, the "Incentive");
>
> G. The Town Parties desire to take all steps as shall be reasonably necessary to issue the Town's Economic Development Revenue Bonds, Series 2013 (Centennial Park Project) in the approximate amount of $7,000,000 (the "2013 Bonds") and, if necessary, appropriate other legally available funds of the Town Parties, in order to provide Developer with not more than $6,400,000 of the Cash Incentive in 2013, and to issue the Town's Economic Development Revenue Bonds, Series 2015 (Centennial

> Park Project) in the approximate amount of $8,500,000 (the "2015 Bonds"), and, if necessary, appropriate other legally available funds of the Town Parties, in order to provide Developer with not more than $7,800,000 of the Cash Incentive in 2015, unless the bonds are issued in 2014.
>
> H. The Town Parties have determined that it is in the best interest of the citizens of the Town to assist in (i) the Public Infrastructure Project; (ii) the provision of the Incentive to cover all or a portion of the costs of the Public Infrastructure Project and encourage the construction of the Developer Project, including the housing component of the Developer Project; and (iii) the taking of such other actions as are hereinafter set forth, all for the promotion of economic development in or about the Area; and
>
> I. The Town Parties and the developer desire to enter into this Agreement to effectuate the foregoing recitals, to the end that the Development shall be constructed in the Area.

Appellant's App. Vol. II pp. 97-98. The Development Agreement, regarding the portion of land sold by Munster Steel to the Developer, provided:

> Within five (5) business days of completion of the new Munster Steel Co. facility, as determined by the Developer obtaining Certificate of Occupancy from the City of Hammond, Indiana, (A) the Town shall convey to the Developer the unencumbered title to all land currently owned by the Town within the Development Site identified on Exhibit D hereto
>
> . . . .
>
> (B) the Developer shall take any and all actions as may be necessary to cause Munster Steel Co. to convey to the Town title to the existing Munster Steel Co. site (with title being subject only to the right of Munster Steel Co. to remain on the premises for a period of nine (9) months, commencing upon the date of issuance of the Certificate of Occupancy from the City of Hammond, Indiana), as security for the performance of the Developer's obligations hereunder to complete Segment I of the

> Public Infrastructure Project and to secure funding of Segment II of the Developer Project
>
> 4. Simultaneously with the Developer's deposit of the Segment II Private Funds into the Trust Indentures, if the Town has acquired title to the Munster Steel Co. site, the Town agrees to convey to the Developer all of the Town's right, title, and interest in the existing Munster Steel Co site; provided, however, the Town may reserve to itself and exclude from such transfer (1) the right-of-way as shown on the attachment to Exhibit hereto.

Appellant's App. Vol. V p. 119–20 (italics omitted).

[5] In February of 2017, Munster Steel sued the Developer. Munster Steel claimed that the transfer of the Property between the Developer and the Town Parties constituted a sale, triggering the Subsequent Sale Provision requiring that Munster Steel, as the Seller, be paid a subsequent sale fee if there was a sale within two years of the closing between Munster Steel and the Developer. Following competing motions for partial summary judgment by the Developer and Munster Steel, the trial court entered summary judgment in favor of the Developer on May 18, 2021. In its summary judgment order, the trial court stated:

> 42. The Court found that the deed at issue was produced and procured for the purpose of securing funding for Segment II of the project. The transfer of property at issue was therefore not sale but an equitable mortgage in property.
>
> 43. A deed, although absolute on its face, is nothing more than a mortgage when executed to secure an existing debt. *Hanlon v. Doherty*, [109 Ind. 37, 38,] 9 N.E. 782, 782 (Ind. 1887). No matter what form the transaction may assume, if it appears that the instrument was executed to secure subsisting debt, it will be adjudged a mortgage. *Id* at 109 Ind. 38, 9 N.E. 782-83.

> 44. The DEFENDANTS correctly argued that to accept the PLAINTIFF'S argument here would require this Court to disregard the language of the Real Estate Contract, the language of the Development Agreement, and decades of case law precedent from both our Indiana Supreme Court and our Court of Appeals.

Appellant's App. Vol. VII pp. 160–61.

Discussion and Decision

[6] Munster Steel contends that the trial court erred in granting the Developer's motion for summary judgment.

> When reviewing a grant or denial of a motion for summary judgment our well-settled standard of review is the same as it is for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Once these two requirements are met by the moving party, the burden then shifts to the non-moving party to show the existence of a genuine issue by setting forth specifically designated facts. Any doubt as to any facts or inferences to be drawn therefrom must be resolved in favor of the non-moving party. Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows there is no genuine issue of material fact and that the moving party deserves judgment as a matter of law.

Goodwin v. Yeakle's Sports Bar & Grill, Inc., 62 N.E.3d 384, 386 (Ind. 2016) (internal citations omitted). "We review questions of law de novo and owe no deference to the trial court's legal conclusions." *Floyd Cnty. v. City of New*

Albany, 1 N.E.3d 207, 213 (Ind. Ct. App. 2014). The party appealing the grant or denial of summary judgment has the burden of persuading this court on appeal that the trial court's ruling was improper. *Id.*

[7] In Indiana "[w]hen it is necessary to accomplish the ends of justice, in an equitable proceeding, a deed though absolute on its face is held to be a mortgage." *Singer v. Burcham*, 140 Ind. App. 378, 385, 216 N.E.2d 532, 537 (1966). Whether a deed which is absolute on its face is in fact a mortgage depends upon the intention of the parties at the time of its execution. *Patterson v. Grace*, 661 N.E.2d 580, 583 (Ind. Ct. App. 1996).

I. Parol Evidence

[8] Munster Steel argues that, because the Development Agreement was ambiguous, we may look to parol evidence in determining whether the parties intended it to be an equitable mortgage. "Generally, the parol evidence rule prohibits courts from considering parol or extrinsic evidence for the purpose of varying or adding terms to a written contract where an integration clause states that the written document embodies the complete agreement between the parties." *Id.* at 583–84. While it is true that parol evidence is generally admissible to determine whether an absolute deed was intended as a mortgage, "[w]hen a contract is unambiguous, the intent of the parties should be determined by the language employed in the document." *Thomas v. Thomas*, 577 N.E.2d 216, 219 (Ind. 1991). "It is only where the terms are ambiguous than an exception to this rule applies." *Id.* at 220 (quoting *In re marriage of*

Bradley, 433 N.E.2d 54, 55 (Ind. Ct. App. 1982)). Further, in cases such as this with no ambiguity as to the contract or writings involved, "[p]arol evidence will not be received for the purpose of showing that the parties intended that a transaction evidenced by writings of that description, should constitute a sale." *Voss v. Eller*, 109 Ind. 260, 262–63, 10 N.E. 74, 76 (1887).

[9] The Developer claims that because Munster Steel did not argue that the Development Agreement was ambiguous before the trial court, any argument concerning the ambiguity of the Development Agreement is waived. Munster Steel agreed before the trial court that the Development Agreement was unambiguous. Munster Steel, however, attempts to preserve its appellate argument that the Development Agreement was ambiguous, claiming that "[b]efore the trial court, Munster Steel designated substantial extrinsic evidence to demonstrate that no equitable mortgage had been created, and it never argued that such evidence could not be considered." App. Reply Br. p. 9. It is well settled that "arguments not presented to the trial court on summary judgment are waived on appeal." *King v. Ebrens*, 804 N.E.2d 821, 826 (Ind. Ct. App. 2004). By admitting that the Development Agreement was unambiguous and making distinct arguments below, neither of which was that the

Development Agreement was ambiguous, Munster Steel has waived[1] that argument for review.

II. Equitable Mortgage

[10] The remaining question for us is to determine whether the transfer of the Property by the Developer to the Town Parties in exchange for development incentives, which included $14,200,00.00, was intended to be a sale or equitable mortgage. As stated above, because the parties agreed before the trial court that the Development Agreement was unambiguous, we will not consider parol evidence and confine our review to the Development Agreement and the Real Estate Agreement.

[11] Munster Steel argues that, according to *Moore v. Linville*, 170 Ind. App. 429, 352 N.E.2d 846 (1976), because the Developer transferred absolute title to the Town in exchange for $14,200,000.00, twelve acres of new real estate, and tax incentives, there was necessarily a sale rather than an equitable mortgage. In *Moore,* "[Moore] executed a warranty deed conveying the real estate to [Linville]. Simultaneously [Linville] and [Moore] executed a 'real estate loan and re-conveyance agreement[,]'" *id.* at 431, 352 N.E.2d at 847, which

[1] Further, Munster Steel argues that the trial court erred in granting the Developer's motion for summary judgment because the intent of the parties was a question of fact properly reserved for the factfinder. While it is true that "the parties' intention is a question of fact for the jury or court to determine[,]" *Patterson*, 661 N.E.2d at 584, it is clear that waiver of the argument that there was any ambiguity in the Development Agreement also confines our review of the intent of the parties to the four corners of the document.

provided that when the loan was repaid, Linville "will be required to reconvey to Second party the [above-described] real estate." *Id.*, 352 N.E.2d at 848. However, while Moore believed that the transaction conveyed fee simple title to Linville subject to a right to reconveyance, Linville believed that the documents had created a security agreement for the funds which he had advanced. *Id*. at 432, 352 N.E.2d at 848. The *Moore* court held that "The absolute warranty deed from [Moore] conveyed legal title to [Linville]; the agreement, which contained no provision voiding said deed upon [Moore's] performance, could not have re-vested legal title in [Moore] even had they performed as agreed." *Id*. at 435, 352 N.E.2d at 850. While Munster Steel relies on this holding as denying the possibility that an equitable mortgage may be created when absolute title is transferred, that is not the case. The *Moore* court went on to explain that "[Moore's] interest in the real estate following the transaction was an equitable right to compel [Linville] to reconvey the real property upon [Moore's] performance." *Id*., 352 N.E.2d at 850. In fact, an equitable mortgage necessitates the passing of absolute title and the equitable right to a reconveyance, because "where a deed absolute in form was intended as a security, […] It is not a proper mortgage. In equity it is construed to be such for the purpose of preventing imposition and injustice; but at law it is simply what on its face it purports to be, an absolute deed in fee simple." *Ferguson v. Boyd*, 169 Ind. 537, 546, 81 N.E. 71, 73 (1907).

[12] The Development Agreement defines the purpose and nature of the transfer of the Property, providing the following:

> [T]he parties hereto agree that the acquisition (whether by purchase, lease, exchange or other method), demolition and clearance of the existing Munster Steel Co. site shall be the first priority of the Town and the Redevelopment Commission, and that expenditures from available funding hereunder shall be prioritized accordingly. In furtherance of said priority, the parties agree as follows:
>
> > 1. A portion of the proceeds from the 2013 Bonds, in the amounts as set forth in Exhibit C hereto, shall be made available to the Developer hereunder in order to provide funds, together with the Segment I Private Funds and the Segment I Private Escrow Funds, for the purpose of enabling the Developer to acquire the existing Munster Steel Co. Site.

Appellant's App. Vol. II p. 120. The Development Agreement also makes it clear that the Property and title will be transferred as security and that it will revert back to the Developer if specific conditions are satisfied:

> (B) the Developer shall take any and all actions as may be necessary to cause Munster Steel Co. to convey to the Town title to the existing Munster Steel Co. site (with title being subject only to the right of Munster Steel Co. to remain on the premises for a period of nine (9) months, commencing upon the date of issuance of the Certificate of Occupancy from the City of Hammond, Indiana), as security for the performance of the Developer's obligations hereunder to complete Segment I of the Public Infrastructure Project and to secure funding of Segment II of the Developer Project
>
> 4. Simultaneously with the Developer's deposit of the Segment II Private Funds into the Trust Indentures, if the Town has acquired title to the Munster Steel Co. site, the Town agrees to convey to the Developer all of the Town's right, title, and interest in the existing Munster Steel Co. site; provided, however, the Town may reserve to itself and exclude from such transfer (1) the right-of-way as shown on the attachment to Exhibit hereto.

Appellant's App. Vol. V p. 119–20 (italics omitted).

[13] The Real Estate Contract defines subsequent sale as "contract for sale of all or one or more portions of the Property in one or more transactions ('Subsequent Sales') within two (2) years of the date of the closing of Real Estate Contract." Appellant's App. Vol. II p. 46. The Real Estate Contract also provides that "there shall not be Subsequent Sale if there is no or only nominal (less than [$100.00]) consideration passing between the Buyer and transferee entity and the majority owner[.]" Appellant's App. Vol. II p. 46. The Real Estate Agreement detailed that the Subsequent Sale Provision "shall be based upon the gross sales price" to determine the value of any subsequent fee owed. Appellant's App. Vol. II p. 46. Though it is uncontested that the Developer received substantial benefits as a part of the Development Agreement, those benefits are not a gross sale price but, rather, an incentive for their development of the Property and related projects. The trial court correctly found that the transfer of property at issue "did not possess a gross sales price[,]" and that the structure of the Developer's transfer of the Property "was not listed as a possible example of a subsequent sale under the Real Estate Contract." Appellant's App. Vol. VII p. 159.

[14] "[I]t has long been the law in Indiana that a deed, even if absolute on its face, executed contemporaneously with an agreement to reconvey upon performance of conditions is a mortgage." *Huffman v. Foreman*, 163 Ind. App. 263, 273, 323 N.E.2d 651, 657 (1975); *see also Ferguson v. Boyd*, 169 Ind. 537, 546, 81 N.E. 71, 73 (1907), *Sinclair v. Guzenhauser*, 178 Ind. 78, 98 N.E. 37, 53 (1912), *Smith v. Brand*, 64 Ind. 427, 430 (1878). The Town's reconveyance of the Property is

ensured by the Development Agreement so long as the Developer fulfils its obligations under the agreement. "No matter what form the transaction may assume, if it appears that the instrument was executed to secure a subsisting debt, it will be adjudge a mortgage. The controlling element is the existence of the debt, and the execution of an instrument to secure it." *Hanlon*, 109 Ind. at 38, 9 N.E. at 782–83. The Development Agreement created an equitable mortgage, as it identifies that the transfer of the Property was intended "as security for the performance of the Developer's obligations hereunder to complete Segment I of the Public Infrastructure Project and to secure funding for Segment II of the Developer Project[,]" Appellant's App. Vol. V pp. 119–20, and calls for the reconveyance of "the Town's right, title, and interest[,]" Appellant's App. Vol. V p. 120, in the Property "[s]imultaneously with the Developer's deposit of the Segment II Private Funds into the Trust Indentures," as satisfaction of a debt. Appellant's App. Vol. V p. 120. The trial court was correct in concluding that according to "the language of the Real Estate Contract, the language of the Development Agreement, and decades of case law[,]" the transfer of the Property at issue was "not a sale but an equitable mortgage in property." Appellant's App. Vol. VII pp. 160–61.

[15] The judgment of the trial court is affirmed.

Crone, J., and Tavitas, J., concur.