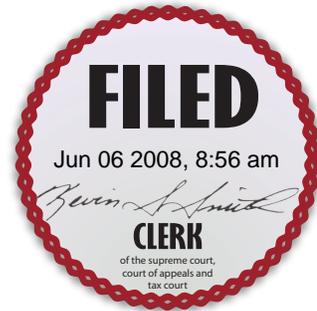


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID G. TENNIS,)

Appellant-Defendant,)

vs.)

No. 49A04-0710-CV-577

AAA BAIL BONDS, INC.,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Cynthia Ayers, Judge
Cause No. 49D04-0209-CT-001645

JUNE 6, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Plaintiff-Appellant David G. Tennis appeals the trial court's rulings in favor of Defendant-Appellee AAA Bail Bonds, Inc. We affirm.

Tennis raises two issues for our review, which we restate as:

- I. Whether the trial court's denial of Tennis' motion for partial summary judgment was contrary to law because AAA failed to timely answer Tennis' request for admissions.
- II. Whether the trial court's ruling after a bench trial is clearly erroneous.

In deciding this case, the trial court entered findings of fact and conclusions thereon, and we recite the pertinent findings and conclusions herein. On August 9, 1999, Tennis entered into an agency agreement with AAA to perform as a bonding agent. (Finding of Fact #1; Appellant's App. at 130). Part of the agreement describes the creation of a "Build-Up Fund" ("BUF") "for purposes of indemnification of [AAA] against expenses and losses during the course of [the] employment relationship" between Tennis and AAA. (Finding of Fact #2; Appellant's App. at 130).

Tennis ended the agency relationship with AAA on August 6, 2000. (Finding of Fact #5; Appellant's App. at 131). "At some point prior to May, 2002, [Tennis] made a demand, by fax, to Tony Widgery, the manager of [AAA] for any remaining balance of his [BUF] account." (Finding of Fact #6; Appellant's App. at 132). Widgery responded to Tennis by fax on May 16, 2002, with a listing of expenses for retrieval of forfeitures, late surrender fees, and expenses for investigation to retrieve "skips" on bonds that Tennis had written. "By [Widgery's] calculations, the expenses that AAA paid on Tennis' behalf exhausted and exceeded the balance in the [BUF] fund." (Finding of Fact

#7; Appellant’s App. at 132). According to Widgery, AAA was required to make efforts to mitigate damages caused by forfeitures, late surrender fees, and “skips” due to the shortfall that had previously been Tennis’ responsibility. These costs were paid from the BUF, “and on May 21, 2002, after a final accounting, \$11,395.55 was withdrawn from the [BUF]. On May 28, 2002, the account was closed.” (Finding of Fact #8; Appellant’s App. at 132). Tennis filed a complaint claiming conversion by AAA and seeking to reclaim the money from the BUF. The trial court found that AAA acted within its authority to withdraw the funds. (Finding of Fact #13; Appellant’s App. at 133). Tennis now appeals.

A.

Tennis points to requests for admissions that he filed upon counsel for AAA on February 25, 2005. The admissions included requests seeking concessions with respect to each element of Tennis’ conversion claim. Tennis asserts that AAA failed to comply with Indiana Trial Rule 36 and that the admissions, which indeed are damning, should be deemed admitted by law, unless the party served with the admissions requests the trial court to withdraw or amend the admissions.

Tennis further claims that AAA had not responded to the request for admissions by May, 2005, and that his motion for partial summary judgment was properly based upon the admissions deemed admitted. Thus, he claims that the trial court’s denial of the motion was contrary to law.

The trial court made conclusions pertinent to this issue, and we recite them for purposes of understanding the trial court’s reasoning. The trial court concluded:

[Tennis] served Requests for Admissions on [AAA] on February 24, 2005. The Requests were not answered by [AAA] until November 3, 2005. Responses to requests for admissions are, pursuant to Trial Rule 36, due within 30 days after service. However, due to ongoing and frequent discovery disputes, the Court heard argument on [Tennis'] Motion For Sanctions on October 5, 2005 and ordered [AAA] to comply with discovery by re-submitting all answers to interrogatories, requests for production and other outstanding discovery that [AAA] had tendered to [Tennis'] prior counsel forthwith. The Court again heard argument on [Tennis'] Motion For Sanctions on April 26, 2006 and entered its order on June 12, 2006 and later an amended order on June 14, 2006. This order encompassed all of [Tennis'] previous requests for sanctions and was also the subject of [Tennis'] Motion for Partial Summary Judgment that was heard on February 26, 2007. The same date, the Court again heard argument on [Tennis'] Motion for Sanctions. An order was issued on March 5, 2007 denying [Tennis'] Motion. This order covered all issues concerning late or incomplete discovery requests, which included the matter of [Tennis'] Requests For Admissions. The Court was satisfied that [AAA] responded appropriately to discovery by its November 30, 2005 tender of answers to [Tennis'] requests and thereby required no further answer from [AAA].

(Appellant's App. at 134).

Frankly, we note that the parties' recitations about what happened with the requests for admissions are inconsistent and puzzling. However, our examination of the record in this case discloses that a hearing was held on October 5, 2005, in which discovery was addressed. In that hearing, AAA's counsel explained that "full discovery" had been proffered to Tennis's initial trial counsel, to Tennis during a period where he was representing himself *pro se*, and to Tennis' current trial counsel. This discovery submitted to initial trial counsel and to Tennis acting *pro se* appeared to have been misplaced. Later, on November 30, 2005, a signed copy of the denials and admissions

was filed. It appears, and we agree, that because of the mix-ups due to prior counsel and Tennis' short-term *pro se* status, the trial court properly allowed withdrawal and re-submission of the discovery pursuant to T.R. 36(B) and determined that amendment to the denials and admissions would further the presentation of the merits and not be prejudicial to Tennis. Accordingly, we cannot say the trial court's denial of partial summary judgment was contrary to law.

B.

Tennis contends that the trial court's ruling after the bench trial was clearly erroneous.¹ Tennis argues that AAA failed to present sufficient evidence to show that it was entitled to withdraw the entire contents of the BUF.

In support of its decision, the trial court issued a number of pertinent findings of fact and conclusions thereon. As the court found, Items 8 and 9 of the agreement set out the terms and conditions of the relationship between AAA and Tennis for accounting of expenses generated during the writing of bail bonds. (Finding of Fact #3; Appellant's App. at 131). "Pursuant to paragraph 8 of the [agreement], [Tennis] was required to remit and did remit to AAA an amount equal to 10% of the gross premium of each bond or undertaking he executed, with such sum to be deposited by AAA into a trust account [BUF] to be held by AAA during the life of the [agreement]." *Id.* During the course of Tennis' association with AAA, part of the money in the BUF account "was used for short falls in revenue and premiums due and owing to [AAA] pursuant to the [agreement]. . .

¹ Having addressed the issue of the admissions in Section A above, we will not address Tennis' renewed claims in our discussion under Section B.

As of April 30, 2002, the account balance in the [BUF] was \$11,386.23.” (Finding of Fact #4; Appellant’s App. at 131). After Tennis ended his employment with AAA, and as noted in our discussion above, Widgery responded to Tennis’ demand about the BUF with a fax listing expenses for the retrieval of forfeitures, late surrender fees, and expenses for investigation to retrieve “skips” on bonds that Tennis had written. By Widgery’s calculations, “the expenses that AAA paid on [Tennis’] behalf exhausted and exceeded the balance in the [BUF]. (Finding of Fact #7; Appellant’s App. at 132). Thus, the account was closed. (Finding of Fact #8; Appellant’s App. at 132). Pursuant to the agreement, “the parties understood and agreed that the purpose of the [BUF] was to mitigate and indemnify [AAA] for costs associated with agent forfeitures, late surrender fees, and ‘skips.’” (Finding of Fact #9; Appellant’s App. at 132). At trial, AAA presented testimony that it had experienced “over \$200,000 of losses on the books and had outstanding more than [\$1,000,000] of open bonds that belonged to [Tennis]” and that “[Tennis] was unable to account for efforts he made to mitigate alleged losses accruing to AAA due to the forfeitures, late surrender fees, or ‘skips’ on bonds he had written. (Finding of Fact #10; Appellant’s App. at 132).

Tennis denied that there were any losses attributable to him, although he admitted that AAA would have been allowed to deduct administrative fees from the BUF if judgments had been entered against him. However, he denied “having been informed by AAA that any such actions had, in fact, occurred.” *Id.* at 133. “The question of administrative fees within the context was governed by the amount of expenses generated in terms of forfeitures, late surrender fees, and investigation of ‘skips’ through [AAA] . . .

. and “[a]ll parties were responsible for making efforts to mitigate costs, including the insurance company sponsoring the bond.” (Finding of Fact #11; Appellant’s App. at 133).

The trial court then noted that paragraph 8 of the agreement granted AAA “the right to withdraw funds from the [BUF] to pay or reimburse itself for any and all losses and expenses covered by the terms of the indemnity clause.” (Finding of Fact #12; Appellant’s App. at 133). The trial court further noted that paragraph 11 reserves the right for AAA “to settle any forfeitures and/or judgments in any manner it deems necessary to protect the Surety, in each case.” *Id.* Finally, the trial court found that “[AAA] acted within its authority to withdraw funds from the [BUF].” (Finding of Fact #13; Appellant’s App. at 133).

The trial court concluded that “Tennis’ claim for Conversion is governed by Ind. Code § 35-43-4-3 and Ind. Code § 34-24-3-1,” which require knowing or intentional exertion of unauthorized control over another’s property and “[AAA] did not knowingly or intentionally exert control over [Tennis’] property.” (Conclusion of Law #B3; Appellant’s App. at 135). The trial court further concluded that AAA did not breach its fiduciary duty to Tennis by allowing unauthorized withdrawals and activity with respect to the property contained in the BUF. (Conclusion of Law #B3; Appellant’s App. at 135). The trial court also concluded that the withdrawals made by AAA were authorized by the agreement between AAA and Tennis. Thus, AAA “made authorized withdrawals from [Tennis’] BUF in the amount of \$11,395.55 to cover attorney/court fees,

recovery/investigation fees and miscellaneous expenses owed . . . pursuant to the contract.” *Id.*

First, we note that where a trial court has entered specific findings of fact and conclusions of law under Ind. Trial Rule 52(A), and we will affirm the judgment on any legal theory supported by the findings. *Capheart v. Capheart*, 705 N.E.2d 533, 536 (Ind. Ct. App. 1999), *trans. denied*. In reviewing the judgment, we must first determine whether the evidence supports the findings and second, whether the findings support the judgment. *Id.* The judgment will be reversed only when clearly erroneous. *Id.* Findings of fact are clearly erroneous when the record lacks any reasonable inferences from the evidence to support them. *Id.* In determining whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we will not reweigh the evidence or assess witness credibility. *Id.*

Second, as the trial court concluded, an unambiguous contract is conclusive upon the parties to the contract and upon the court. (Conclusion of Law #C2; Appellant’s App. at 136) (citing *McLinden v. Coco*, 765 N.E.2d 606, 611-12 (Ind. Ct. App. 2002)). When a court is called upon to interpret an unambiguous contract; it must give effect to the intention of the parties “as expressed in the four corners of the document.” (Conclusion of Law #C1; Appellant’s App. at 136) (quoting *Art Country Squire LLC v. Inland Mortgage Corp.*, 745 N.E.2d 885, 889 (Ind. Ct. App. 2001)). Here, the trial court concluded that the agency agreement between AAA and Tennis was clear and

unambiguous and that Tennis failed to show that AAA did not follow the dictates of the agreement. (Conclusion of Law #C; Appellant's App. at 136).

As noted above, the pertinent provisions of the agreement are paragraphs 8, 9 and

11. Paragraph 8 provides in pertinent part:

For the protection of AAA and the Surety against any possible loss, and to provide a fund to indemnify (sic) AAA and the Surety with regard to [Tennis'] obligations under the provisions of this Agency Agreement, [Tennis] agrees to the establishment and the continuation of an indemnity [BUF]. . . . After the termination of this Agency Agreement and at such time as AAA and the surety are relieved and fully discharged from any and all liability on any bonds or undertakings executed under this Agency Agreement, AAA and the Surety have been fully indemnified and the covenant not to compete shall have expired and any monies due AAA in regard thereto shall have been paid, the balance of the [BUF], if any, shall be returned to [Tennis]. AAA is hereby granted the right to withdraw funds from the [BUF] to pay or reimburse itself for any and all losses and expenses covered by the terms of the indemnity clause of-for which [Tennis] responsible by reason of this Agency Agreement or otherwise. This [right] to withdraw shall not require prior notification to or any further authorization from [Tennis]. . . .

(Appellant's App. at 24). Paragraph 9 provides in pertinent part:

[Tennis] agrees to indemnify and to hold AAA and Surety, in each case, harmless from and against all risks of loss, damages under this Agency Agreement, whether forfeiture or otherwise. This agreement shall extend to and include, but shall not be limited to any attorney fees or costs incurred by AAA or the Surety with regard to any bond or undertaking, payment for unreported Powers of Attorney assigned to [Tennis] . . . monies owed to AAA as commission and premiums on bonds, payments for Sheriff's executions and judgments, late surrender fees, cost and expenses incurred by AAA to locate, apprehend, return, surrender or otherwise secure the attendance of bond principals in court at their appointed times, costs and expenses incurred by AAA to

prepare reports that [Tennis] has failed or neglected to prepare, to audit incorrect reports that [Tennis] has filed and to correct same, and otherwise perform or obtain the performance of [Tennis'] duties, and the costs and attorney fees incurred by AAA to enforce this indemnity clause or any other term or provision of the Agency Agreement. . . .

Id. Paragraph 11, the indemnity clause, provides in pertinent part:

AAA reserves the right to settle any forfeitures and/or judgments in any manner it deems necessary to protect the Surety, in each case. . . .

(Appellant's App. at 25).

The agency agreement unambiguously provides that Tennis is responsible to cover any losses his actions caused AAA and/or the Surety. Our review of the transcript discloses that there is written evidence and/or testimony to support AAA's claims. We will not reweigh the evidence or assess the credibility of the witnesses.

Affirmed.

NAJAM, J., and DARDEN, J., concur.