2017 IL App (1st) 161769-U

No. 1-16-1769

FIFTH DIVISION
September 29, 2017

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ADRIANNE ROGGENBUCK TRUST, *et al*.,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County.
	)	
v.	)	No. 09 CH 44998
	)	
STEWART TITLE COMPANY, f/k/a Stewart Title of Illinois, and JOSEPH ALDEGUER,	)	The Honorable
	)	Brigid Mary McGrath,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes concurred in the judgment.
Justice Gordon specially concurred.

O R D E R

¶1 *HELD*: The trial court erred in granting summary judgment where a genuine issue of material facts exists regarding whether defendant had knowledge of and participated in a scheme to defraud plaintiffs.

¶2 Plaintiffs, Adrianne Roggenbuck Trust, *et al*., appeal the summary dismissal of their complaint for secondary liability sounding in civil conspiracy, in-concert liability, and aiding and abetting fraud in favor of defendant, Stewart Title Company, f/k/a Stewart Title of Illinois.

Plaintiffs contend the trial court erred in dismissing their complaint where there were sufficient facts demonstrating claims for civil conspiracy and in-concert liability related to defendant's involvement in a real estate fraud scheme for a Florida condominium building. Based on the following, we reverse and remand for further proceedings.

¶3 FACTS

¶4 Plaintiffs are Illinois residents that purchased property in a Kissimmee, Florida condominium complex called Legacy Dunes using the equity in their Illinois homes as capital.

¶5 Prior to the events at issue, Legacy Dunes was a residential apartment development containing 488 individual units. In early 2006, a developer obtained an acquisition loan for $68 million to convert the Legacy Dunes apartments into condominiums. According to the underlying complaint, the developer entered into an agreement with a mortgage broker, Joe Aldeguer, to sell Legacy Dunes units. Aldeguer owned a brokerage called The Mortgage Exchange, Inc. (TME) and promoted himself as a successful and knowledgeable mortgage broker. He was featured in newspaper articles, on radio shows, and on television.

¶6 In selling Legacy Dunes, Aldeguer convinced plaintiffs that the condominiums could be used as investment properties when, in fact, the units were restricted from use as short-term rentals. Aldeguer, however, marketed the development as a condo-hotel that would provide rental proceeds to cover the cost of ownership. During marketing workshops, Aldeguer "trumpeted specific hotel occupancy rates in Orlando" as a selling point. According to plaintiffs, the Legacy Dunes units were appraised above their worth, allowing for excessive commissions to be collected by Aldeguer and the real estate brokers. Plaintiffs additionally alleged the condominiums were not worth their purchase prices due to zoning and declaration restrictions preventing use as short-term rentals. In fact, the condominium declarations expressly restricted

the leasing of any unit for a period of less than seven months. Moreover, the terms of the developer's acquisition loan were such that it took a security interest in all rents collected from the Legacy Dunes units, thereby subordinating any and all rents plaintiffs expected to collect. In short, plaintiffs lost significant sums on their investments and filed the underlying lawsuit.

¶7 In their fourth amended complaint, plaintiffs alleged Aldeguer used a previously created shell corporation called the Real Estate Investment Group (REIG) to sell the Legacy Dunes condominium units. REIG, however, was not licensed to sell Florida real estate so the developers entered an agreement with a Florida real estate agency to market and sell the Legacy Dunes units in return for an excessively high commission. The Florida agency then entered into an agreement with REIG to provide "referral fees" from a portion of those commissions. REIG, therefore, was used as a vehicle to obtain real estate commissions and funnel the money back to TME and Aldeguer. Aldeguer also created a REIG realtor program wherein licensed real estate agents were paid commissions when closing Legacy Dunes condominium units.

¶8 Defendant began doing business with Aldeguer in 1997 *vis a vis* TME. Defendant was an underwriter for TME's real estate sales. Sometime in 2004, Aldeguer formed a company called The Title Exchange (TTE) designed to handle the title business for TME, which was then underwritten by defendant. According to the evidence, the Legacy Dunes units, however, received title insurance underwritten by defendant's competitor. Plaintiffs alleged defendant misled the Illinois Department of Financial Institutions into believing TME changed its name to TTE and would be working under an existing agency agreement; however, TTE was a new entity and no such agreement existed between defendant and TTE. Plaintiffs alleged TTE was a shell corporation, one which had no employees. TME's chief executive officer, Jill Moore, was Aldeguer's ex-wife. Moore operated defendant's TitleMax system for TTE, which was a system

that allowed for title commitments to be obtained via software. The evidence showed that TTE was to perform title examinations for defendant as its TitleMax agent, but, according to plaintiffs, defendant actually performed the title services and paid TME in exchange for kickbacks.

¶9 TME handled the financing for the Legacy Dunes condominium purchases. Most[1] of plaintiffs refinanced their mortgages on their primary Illinois homes to obtain down payments to purchase the Legacy Dunes condominiums. Defendant performed the closings for the refinances in Illinois. Defendant, however, was not licensed to handle the closings for the purchases of the Florida properties. Defendant instead performed the role of "witness notary," in that it witnessed the closing document signings and notarized the requisite signatures, but did not prepare the closing documents or act as an escrow agent. The closings took place remotely in Illinois with TME providing loan officers to attend them.

¶10 Aldeguer's sister, Mira Aldeguer, worked for defendant. One of her clients was TME and she performed closings on plaintiffs' refinances and acted as a witness notary for the Legacy Dunes real estate purchases. In fact, in 2006, Mira and three of defendant's other employees moved into TME's office to conduct defendant's day-to-day business. Defendant had designated office space within TME's office and used its own office equipment. There was a door to defendant's office space within the satellite TME office. TTE also shared office space with TME with a designated desk and signage indicating TTE's office space. Mira attended the REIG's real estate brokerage class to become a REIG realtor. REIG paid for and sponsored Mira's participation in the class.

[1] Defendant identified 25 plaintiffs as having refinanced, but the record indicates 21 of the 37 plaintiffs refinanced.

¶11 According to plaintiffs, Mira signed title insurance documents as an authorized representative for TTE during the refinance closings. The record contains title commitments with an ineligible signature on the TTE signature block without a printed version of the signator's name. The HUD-1 statements for the refinance closings indicated that TTE was to receive $925 in fees and defendant was to receive $150 for conducting the remote closing; however, the disbursement sheets showed that TTE was to receive $750. Accordingly, the HUD-1 and the disbursement sheets did not coincide, as required. A TME employee, Maureen Phillips, identified the use of multiple HUD-1 documents for the Florida closings. In an email, Phillips stated, "I want to make sure we pay Mira and her team $100 to close these, and then there is no risk anyone will ever get the other side of the HUD. I am working out the details with the attorney."

¶12 Barbara Saylor, defendant's president, testified at her deposition that she participated in a preclosing conference call with the Legacy Dunes developer, Phillips, and defendant's vice president. According to plaintiffs, prior to the call, the participants received a document titled "Legacy Dunes-Stewart Title Closings." The document purportedly included talking points for the forthcoming conference call. Saylor, however, recalled that the matter discussed during the call was whether it was possible for the Legacy Dunes closings to have notary closings. Saylor answered in the affirmative.

¶13 According to Saylor, according to defendant's internal policies, a witness notary should not perform services that would raise the appearance of a conflict of interest. Saylor added that a witness notary should not provide a personal opinion to the signor regarding whether to complete a transaction and could not answer specific questions about the transaction. Saylor testified that a witness notary must immediately report any potential or actual misrepresentation or falsehood

known or witnessed in connection with the transaction. According to Saylor, Illinois did not regulate fees for witness notaries; thus, fees would be set between the witness notary and the customer. Saylor additionally noted that it was not unusual for defendant to share offices with mortgage brokers. In fact, a number of defendants' offices throughout Chicago shared space with mortgage brokerage offices.

¶14 Plaintiff Melinda Cockrum provided an affidavit attesting that Mira was present at the TME office when she and her husband filled out the loan application for their Legacy Dunes unit. At the time, the Cockrums expressed concern regarding the mortgage payments. The Cockrums were told "not to worry about it" and that, after three to six months, they would be making a profit of about $500 per month after paying the mortgage. Melinda additionally testified that she and her husband expressed concern that the loan application indicated the mortgage request was for a "secondary residence" and not an "investment." According to Melinda, the Cockrums were told "something like" "the box does not really matter, that we had to list it that way for the loan to get approved, this is how it's done, it is legal and not to worry about it." Melinda attested that "Mira was present in the room" and "appeared to be listening to the conversation."

¶15 The record reflected that Mira performed the closings for 40 of the 45 Legacy Dunes units purchased by these plaintiffs, and 38 of those units contained second home riders attached to the mortgages. The second home riders prohibited anyone but the borrowers from occupying the Legacy Dunes units. In her capacity as a witness notary, Mira read the titles of the documents in the closing packages to the purchasers and instructed them where to sign.

¶16 Plaintiff Adrianne Roggenbuck testified at her deposition that, during a refinance closing, Mira said she would not need to hire an attorney for the subsequent property closing for the

Legacy Dunes purchase. According to Roggenbuck, Mira advised her that "everything was already done, that she would walk her through it all, and that it would save Ms. Roggenbuck money if she did not have an attorney present."[2] Then, during the closing on her Legacy Dunes purchase, Roggenbuck and Mira chatted. According to Roggenbuck, she asked Mira "how is it working with your brother? Must be kind of nice." Mira responded, "It's a great thing. Love working with my brother. ***. We are helping people make a lot of money, and it's very rewarding." When purchasers expressed concerns over the discrepancy between documents showing the property as second homes when in fact the units were intended as investment properties, Mira said, "this is how we're doing this project," and told the purchasers not to worry because they were receiving a lower interest rate by indicating the properties were second homes instead of investment properties. Specifically, Roggenbuck recalled Mira explaining that, since the property was going to become an income property but was not at the time, the mortgage should be for a second home. Roggenbuck added that she was not relying on Mira's explanation because she intended to complete the purchase.

¶17 Additional evidence showed Mira closed units bearing second home riders attached to the mortgage for multiple properties for the same buyer. Moreover, when one purchaser expressed concern that she would not be able to afford the mortgages on her three Legacy Dunes units, Mira advised the buyer that the rental incomes would cover the mortgages and she could sell the units at a profit before the mortgage payments became too high.

¶18 Mira testified at her deposition that she was unaware who marketed or sold the Legacy Dunes units. Her role was limited to the closings. Mira said she did not know anything about the Legacy Dunes mortgages or the pricing of the units. She denied having knowledge that the real estate commissions earned on the sale of the Legacy Dunes units were inflated above the typical

[2] Only one of the 37 plaintiffs used an attorney.

market. Mira also was unaware whether REIG was involved in the sale of the units. Mira added that she understood the condominiums to be second homes. Mira testified that, although she did attend the REIG courses, she never did anything with her license and was never employed by REIG.

¶19 With regard to the refinance closings, Mira testified at her deposition that she "marked up" her file prior to the closings as a step in her preparation. Mira stated that she signed the signature block above the preprinted TTE name on the cover sheet for the title commitments as a matter of practice. Mira explained, "[t]hese never went anywhere. This was in my file. So [the closers] signed it ourselves knowing that that was our file." Mira characterized the paper as an internal note. When asked about the mismatched HUD-1 and disbursement sheets, Mira stated that the additional $175 was a split fee. Mira was unable to elaborate further, merely stating that was "what [she] was supposed to do, [she] guess[ed]. [She] d[id]n't know."

¶20 Mira further testified that, when purchasers asked her questions or opinions during the closing, she considered it "small talk." Mira added, "if people were going to the closing, they already knew what they were doing. If they wanted to have small talk with me, I'm going to have small talk with them. I'm not rude." In describing her role as a witness notary, Mira provided an example of saying, "Okay. Well, this is your settlement statement and these are your figures. This is where you sign." Mira also testified that she advised three buyers that the Legacy Dunes unit purchases were a "good deal," intending the statement to mean the Legacy Dunes units were "a good investment."

¶21 Mira denied advising any of the purchasers that they would obtain a lower interest rate by taking out a second home mortgage instead of seeking a mortgage for an investment property, denied advising any purchasers that they were helping people to make a lot of money, and denied

advising any purchasers not to hire a lawyer for the closing. Mira additionally denied receiving any commissions from Aldeguer related to closing the Legacy Dunes units. Mira maintained that she was paid by defendant and only defendant. Mira testified that all of the closers in the satellite office shared with TME performed the Legacy Dunes closings, alternating names throughout any given week as to who would be assigned to the closing. In addition, Mira stated that Legacy Dunes closings also took place at eight or nine of defendant's other offices.

¶22 Julie Ferrarini testified at her deposition that she was Mira's supervisor. Ferrarini said that her employees at defendant company knew the Legacy Dunes properties were intended as investment properties. Ferrarini testified, in response to questioning why the closings proceeded when defendant knew the properties were intended as investments but the mortgages contained second home riders, that "in a witness closing, we don't question what the lender puts in the package. We don't go over the package; we don't read it. Like, if it was a Stewart closing and we knew it was an investment property, we would call the lender and say why is there a second home rider; this is an investment." Ferrarini added that, as witness notaries, defendant's job was to have the "people sign and notarize where it needed to be notarized."

¶23 The record contains an email from TME's attorney, Daniel Coman, explaining that Aldeguer's marketing methods for Legacy Dunes were improper. The record also contains an email from the Legacy Dunes project manager to Aldeguer expressing concern about residential fraud after Aldeguer conducted a radio show marketing the property as a condominium hotel despite the mortgages for second homes.

¶24 Plaintiffs filed their fourth amended complaint containing 37 different lawsuits pertaining to the Legacy Dunes units purchased by these plaintiffs. In relevant part, plaintiffs presented claims for civil conspiracy and in-concert liability. The fourth amended complaint alleged

Aldeguer engaged in a scheme to defraud plaintiffs by closing Legacy Dunes condominium units as residential property despite selling the units to plaintiffs as investment property. The fourth amended complaint further alleged defendant knew about the fraud and participated in furthering the fraud by closing the refinances and the purchases of the condominium units. Defendant filed a motion for summary judgment requesting dismissal of all of the secondary liability claims. Following a thorough and lengthy discovery period, which included over 80 depositions and extensive document production, the trial court dismissed all of plaintiffs' claims against defendant. This appeal followed.

¶25 ANALYSIS

¶26 Plaintiffs contend the trial court erred in granting summary judgment in favor of defendant.

¶27 Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2014). In determining whether a genuine issue of material fact exists, we construe the pleadings, depositions, admissions, and affidavits strictly against the movant and, drawing all reasonable inferences therefrom, in a light most favorable to the nonmovant. *Destiny Health, Inc. v. Connecticut General Life Insurance Co.*, 2015 IL App (1st) 142530, ¶ 20. Summary judgment is proper only where undisputed facts admit only one reasonable inference. *In re Estate of Ciesiokiewicz*, 243 Ill. App. 3d 506, 510 (1993). That said, the inferences drawn in favor of the nonmovant must be supported by the evidence. *Destiny Health, Inc.*, 2015 IL App (1st) 142530, ¶ 20. Summary judgment for the defendant is proper where the plaintiff fails to establish any element of the cause of action. *Id*. We review an order granting summary judgment *de novo*.

Kenny v. Kenny Industries, Inc., 406 Ill. App. 3d 56, 62 (2010). Therefore, we must analyze the facts presented to the trial court to determine whether summary judgment was properly granted. *In re Estate of Ciesiokiewicz*, 243 Ill. App. 3d at 510.

¶28 Plaintiffs first contend their fourth amended complaint sufficiently established facts supporting a cause of action for civil conspiracy related to Aldeguer's scheme to defraud. More specifically, plaintiffs maintain their fourth amended complaint established defendant unlawfully participated in the refinancing transactions that provided the requisite capital for the Legacy Dunes condominium purchases and then participated in closing the units with residential loans even though plaintiffs believed they were purchasing investment properties.

¶29 To establish a claim for civil conspiracy, a plaintiff must provide evidence showing: (1) a combination of two or more persons; (2) for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means; (3) in the furtherance of which one of the conspirators committed an overt tortious or unlawful act. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 133 (1999). The plaintiff must allege an agreement *and* a tortious act committed in furtherance of that agreement. *Id*.

¶30 Our supreme court has advised:

> "Civil conspiracy is an intentional tort and requires proof that a defendant 'knowingly and voluntarily participates in a common scheme to commit an unlawful act or lawful act in an unlawful manner.' [Citation.] Accidental, inadvertent, or negligent participation in a common scheme does not amount to conspiracy. [Citation.] Similarly, '[a] defendant who innocently performs an act which happens to fortuitously further the tortious purpose of another is not liable under the theory of civil conspiracy.' [Citation.] However, '[a] defendant who understands the general objectives of the conspiratorial

scheme, accepts them, and agrees, either explicitly or implicitly to do its part to further those objectives *** is liable as a conspirator.' " *Id*. at 133-34 (quoting *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 64 (1994)).

¶31 Generally, a conspiracy is established " 'from circumstantial evidence and inferences drawn from evidence, coupled with common-sense knowledge of the behavior of persons in similar circumstances.' " *Id*. at 134 (quoting *Adcock*, 164 Ill. 2d at 66). If circumstantial evidence is relied upon to establish a civil conspiracy, the evidence must be clear and convincing. *Id*.

¶32 Following our review of the record, we conclude there are genuine issues of material fact in this case which prevented entry of summary judgment in favor of defendant. When viewed in concert, the facts could establish that defendant had the requisite knowledge of Aldeguer's scheme to defraud and that there was an agreement by defendant to participate in that overall fraudulent scheme. More specifically, viewing the facts in favor of plaintiffs and drawing reasonable inferences therefrom, there are questions of fact as to whether defendant understood the general objectives of the conspiratorial scheme, accepted them, and agreed, either explicitly or implicitly to do its part to further those objectives. See *McClure*, 188 Ill. 2d at 133-34.

¶33 The record established that Mira, Aldeguer's sister, worked for defendant. She obtained the job after Aldeguer introduced her to one of defendant's sales representatives. During the relevant time period, Mira not only serviced Aldeguer's business, TME, as a client, but also conducted defendant's business out of TME's office. Although the record reflects that Mira was not the only closer that participated in the Legacy Dunes transactions, she closed the vast majority of property sales involved in the underlying case, namely, 40 out of 45 of the units. Moreover, Roggenbuck testified at her deposition that Mira expressed that working with Aldeguer was "a great thing. Love working with my brother. ***. We are helping people make a

lot of money, and it's very rewarding." Mira denied knowing any details about the Legacy Dunes project, such as the marketing, pricing or sales of the units; however, on at least 3 occasions, Mira opined to Legacy Dunes purchasers that their investments were a "good deal," meaning a "good investment." Accordingly, the evidence reasonably established Mira's intimate connection with Aldeguer within the context of the overall scheme.

¶34 In addition, the record sufficiently established defendant's participation in the fraudulent refinance transactions. There is no question that the individuals that refinanced their Illinois homes did so to obtain down payments for the Legacy Dunes properties. Those refinances were executed by defendant, TME, and TTE. The evidence revealed defendant's relationship with TME and TTE was so intertwined that there were no boundaries delineating each company. For example, Moore, Aldeguer's ex-wife, was alleged to be TME's CEO, but she operated defendant's TitleMax system for TTE. Although TTE was supposed to perform the title examinations, the fourth amended complaint alleged defendant actually executed the title examinations and forwarded fees to TME. Moreover, the evidence established defendant failed to accurately report the fees it and TTE actually received for work performed in relation to the refinance transactions and failed to ensure that the HUD-1 and disbursement sheets coincided as was required. Mira's signature also appeared on the cover pages of the refinance title insurance policies in the TTE signature block. Mira explained that, as a matter of course, she signed the cover page for the refinance closings she performed and maintained the documents internally. However, Mira's refinancing-related behavior, in conjunction with all of the other facts, at a minimum created a material question as to whether defendant participated in Aldeguer's overall fraud.

¶35 Furthermore, the evidence demonstrated that Mira's participation in the scheme went beyond that of a "witness notary" at the closings for the Legacy Dunes units. Mira denied having any knowledge regarding the mortgages chosen for the Legacy Dunes properties, 37 of which contained second-home riders restricting their use as investment properties. Mira, however, completed the REIG program and was a licensed real estate agent, whether or not she actually used that license. It is, therefore, reasonable to infer that Mira had a foundational knowledge of mortgages and second-home riders. In addition, at her deposition, Mira denied having knowledge that the Legacy Dunes units were intended as investment properties. She testified that she understood the condominiums to be second homes. This, however, was in direct contrast to the testimony of Ferrarini, Mira's boss. Ferrarini confirmed that all of her closers knew that the Legacy Dunes condominiums were investment properties. Although Ferrarini also described the role of a witness notary and clearly established that Mira and any other closer was limited in reading the titles of the documents in the closing packages and directing them where to sign, Mira admittedly went outside her limited role by providing advice to at least three purchasers.

¶36 Moreover, plaintiff Cockrum testified that Mira was in the room and showed signs of observing the conversation Cockrum had when filling out her loan application. During that conversation, Cockrum and her husband expressed concerns about the loan application inaccurately reflecting that the condominium was intended as a secondary home instead of an investment. Considering Mira's exposure to that conversation along with her later advice to other plaintiffs further demonstrates questions of material fact regarding defendant's participation in the overall fraud. More specifically, the record contains testimony wherein Mira discouraged the use of attorneys for the closings, dismissed plaintiffs' concerns that documents inaccurately reported the Legacy Dunes purchases as second homes instead of investment properties—even

noting plaintiffs were receiving lower interest rates as a result, and assured at least one plaintiff that rental incomes would be enough to pay the mortgage. Mira denied all of these conversations; however, assessing credibility and weighing evidence is improper at the summary judgment stage. *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 396 (2008).

¶37 In sum, we conclude that, based on the collective evidence in the record, there are questions of material fact regarding whether defendant understood the general objectives of Aldeguer's fraudulent scheme, accepted them, and agreed, either explicitly or implicitly to do its part to further those objectives. See *McClure*, 188 Ill. 2d at 133-34. As a result, we find the trial court erred in granting summary judgment in favor of defendant.

¶38 Plaintiffs next contend the trial court erred in granting summary judgment of their in-concert liability claims where the evidence sufficiently established facts to support the causes of action. More specifically, plaintiffs argue that defendant facilitated the Legacy Dunes unit closings, directed plaintiffs to sign the second home riders, encouraged the closing of the transactions through advice and opinions, and took no action to prevent the fraudulent closings.

¶39 Section 876 of the Restatement (Second) of Torts imposes liability on those persons who act in concert with another tortfeasor, giving substantial assistance or encouragement to another's tortious conduct. More specifically, in-concert liability is defined, in relevant part, as:

> "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) does a tortious act in concert with the other pursuant to a common design with him, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." Restatement (Second) of Torts § 876, at 315 (1979).

In *Simmons v. Homates*, 236 Ill 2d 459 (2010), the supreme court recognized five factors to be considered in determining whether in-concert liability will attach. Citing the comment to subsection (b) of section 876 of the Restatement (Second) of Torts, the five factors are (1) the nature of the act encouraged, (2) the amount of assistance given by the defendant, (3) his presence or absence at the time of the tort, (4) his relation to the other, and (5) his state of mind. *Id*. at 477 (citing Restatement (Second) of Torts § 876, Comment *b*, at 317 (1979)). The comment to subsection (b) of section 876 of the Restatement (Second) of Torts instructs that these factors should be applied when "[t]he assistance of or participation by the defendant may be so slight that he is not liable for the act of the other."

¶40 As described in relation to the prior civil conspiracy analysis, we find there are questions of fact regarding whether defendant performed tortious acts in concert with Aldeguer pursuant to a common design or provided substantial assistance to Aldeguer to accomplish the overall scheme to defraud. As a result, we conclude the trial court erred in granting summary judgment in favor of defendant.

¶41 CONCLUSION

¶42 We reverse the judgment of the trial court granting summary judgment in favor of defendant where genuine issues of material fact exist preventing entry thereof. We remand this cause for further proceedings.

¶43 Reversed; remanded.

¶44 JUSTICE GORDON, specially concurring:

¶45 While I concur with the majority's conclusion that we must reverse, I write separately in order to elaborate and provide more detail about both the law and the facts, and also to specifically list the points which led to my conclusion.

¶46 On this appeal, the issue is whether the trial court properly granted defendant Stewart Title Company's (Stewart's) motion for summary judgment.

¶47 All of plaintiffs' causes of action against Stewart are based on theories of secondary liability and, thus, require some evidence of knowledge by Stewart of the target tortfeasor's wrongdoing and an agreement or participation in the tortfeasor's wrongdoing, in order for plaintiff to make out a *prima facie* case. In the case at bar, the target tortfeasor is defendant Joseph Aldeguer. Stewart argues that plaintiffs cannot show that Stewart had the requisite knowledge of Aldeguer's allegedly wrongful acts, or that it had agreed to provide the requisite assistance to Aldeguer.

¶48 I do not repeat here a summary of the case. Instead, I use this concurrence to highlight the facts and evidence which I consider significant.

¶49 There is sufficient evidence here from which a reasonable factfinder could find that Stewart knew of and was participating in Aldeguer's scheme. This finding is not based on one piece of evidence but on inferences from all the evidence submitted that, together, creates a factual issue. It does not have to be one piece of evidence, by itself, that creates the inference. *People v. McKown*, 236 Ill. 2d 278, 304 (2010) ("Each individual item of evidence does not have to prove the fact at issue [.] *** By way of analogy, it is often said that " 'a brick is not a wall.' "). The trial court analyzed each piece of evidence, one by one, in isolation, in making its findings. I did not do that in analyzing this case. I looked at all the evidence together to reach a

conclusion. When you lay all the evidence next to each other, side by side, it becomes difficult to believe that Stewart did not have knowledge about Aldeguer's allegedly fraudulent scheme.

¶50 First, there are the close family ties between the parties that allegedly perpetuated the fraud: Aldeguer and Stewart. Aldeguer's sister Mira[3] worked at Stewart; and Aldeguer's ex-wife, Jill Moore, operated Stewart's TitleMax system, which permitted title commitments to be obtained by using software. Mira testified at her deposition that she met a sales representative at Stewart through her brother and that is how she obtained her employment there. In addition, Stewart has been doing business with Aldeguer since 1997.

¶51 Second, Stewart participated in a related fraud that appears to be part of the same overall scheme involving the same properties and, thus, Stewart was aware of that fraudulent scheme. The trial court concluded that, just because Stewart knew of one fraud, it does not mean that it necessarily knew of another fraud being perpetuated by Aldeguer using the same properties. However, when Stewart had knowledge of one fraud, it is certainly reasonable to conclude, when its closers were working on the same properties with the same individual who was involved in that fraud, that they were placed on notice. This is a piece of relevant circumstantial evidence, which a factfinder must consider.

¶52 Third, Julie Ferrarini, Mira's boss at Stewart, testified that Stewart employees at these closings knew the property was intended to be an investment property. When asked for her "understanding about what the purchasers believed when they were going to purchase these Legacy Dunes Condominiums," Ferrarini replied: "They were buying an investment property." When asked if her "closers knew that too," she replied: "Correct." Ferrarini then listed the four closers, including Mira. Thus, according to Ferrarini's testimony, all of the Stewart closers knew

[3] Since Mira shares the same last name as her brother, who is also the target tortfeasor, I refer to her as "Mira" and to him as "Aldeguer."

that these condos were being purchased as investment properties; yet, the Stewart closers closed on them as non-investment properties, filling out documents which showed them to be non-investment properties as directed by Aldeguer when they knew they were not. This fact, with all of the other facts of the case, create a factual issue to be decided by the trier of fact.

¶53 Fourth, despite Ferrarini's testimony about the closer's knowledge, Mira, who was a closer, testified that she knew nothing. At her deposition, Mira, who admitted that Ferrarini was her boss, denied knowing what the purchasers intended to do with the properties:

"QUESTION: Do you know what type of property it was?

MIRA: Second home. I don't know.

QUESTION: Can you tell me anything else about the property today?

MIRA: No."

Later, Mira testified:

"QUESTION: Do you recall having any discussions about Legacy Dunes being an investment property for them?

MIRA: No." [4]

The answers to these questions are at odds with Mira's conduct as we explain further. Melinda Cockrum, one of the plaintiffs, averred in an affidavit that she or her husband asked why the secondary residence box was checked rather than the investment box on the loan application and they were told that the box did not really matter. Mira was in the room, and made eye contact with her, and appeared to be listening to the conversation; and yet Mira made no indication that the information was incorrect. Three of the plaintiffs testified that Mira encouraged them to

[4] Similarly, later in her deposition, Mira was asked what the property was "to be used for," and she replied: "For a second home." When asked whether she had "any understanding as to whether or not the people were investing and were buying that investment to make money," she replied "[n]o."

purchase the condominium units during the closing by saying things like they were a good deal. The trial court discounted those statements as "mere puffery" and "chatter." When the trial court used the words "puffery" and "chatter," plaintiff's counsel objected stating that the trial court was making a "credibility adjudication." Plaintiff is correct that this conclusion is a credibility determination that is not appropriate in deciding a motion for summary judgment. The trial court conceded that this kind of statement could show knowledge but discounted it because only 3 out of 69 purchasers recalled it. Again, whether 3 out of 69 makes it credible, or 10 out of 69, is not a determination that should be made at a summary judgment disposition. Plaintiff's evidence establishes that what Mira knew or did not know is an issue of fact requiring a credibility determination.

¶54 Fifth, in addition to being an issue of fact, it is also material. Although Mira testified at her deposition that she "wouldn't specifically be assigned to more Dunes closings than others," the record reflects that she performed the closings for 40 of the 45 Dunes units purchased by plaintiffs. This evidence, taken together with all of the other evidence, supports the conclusion that a factual issue exists. Since Mira performed the vast majority of these closings, what Mira knew about the actions of her brother, the target tortfeasor, becomes particularly significant. Adrianne Roggenbuck, one of the purchasers, testified that Mira stated: "Love working with my brother, and you know, we are helping people to make a lot of money ***." That statement, taken with all of the other evidence here further supports the conclusion that a factual issue remains to be decided.

¶55 Sixth, at her deposition, Mira admitted to telling purchasers that the property was "a good deal,"[5] but then claimed she had "no clue" –her words, not mine—about why that would be true:

[5] Ferrarini testified that closers were not allowed to provide any opinions regarding the transaction to purchasers.

"QUESTION: And what factual information did you base that opinion on when you said that?

MIRA: I don't know. I just thought it was a good idea.

QUESTION: Do you know anything about how the mortgage was supposed to work for the buyers of the Legacy Dunes units?

MIRA: No.

QUESTION: But you still thought it was a good idea?

MIRA: Yes.

QUESTION: Did you have any idea about how the pricing was going to work for the units?

MIRA: No.

QUESTION: But you still thought it was a good idea?

MIRA: Yes. Who wouldn't want to buy a property in Florida?

QUESTION: Did you have any idea about whether or not the property was zoned for a short term rental unit or not?

MIRA: I have no clue.

QUESTION: And you still thought it was a good idea?

MIRA: I have no clue. That's—what does zoning have to do with me having an opinion?"

This is only a sample of Mira's deposition testimony. Her deposition testimony is filled with repeated denials of any knowledge of any kind.[6] For example, she denied even knowing who was selling or marketing the Dunes properties when it was her own brother. Whether her

[6] Reading Mira's deposition transcript, this author was reminded of a character on an old television show, Sergeant Schultz on *Hogan's Heroes*, who was famous for always saying "I know nothing."

repeated denials of knowledge strain credulity is, again, a credibility determination to made by the factfinder. In granting summary judgment, the trial court credited her testimony as true, again making a credibility determination.

¶56 Seventh, in addition to the contradictions between Mira's testimony and Julie Ferrarini's testimony, Mira also claimed that the purchasers were "lying" in their depositions. Adrianne Roggenbuck, one of the purchasers, testified that she discussed with Mira whether the property was an income property or a second home, and that Mira suggested that the purchaser "would get a lower rate by doing it as a second home versus an income property on [her] mortgage." When Mira was asked about that testimony at her own deposition, Mira asserted that the purchaser was lying. Again, credibility determinations belong at a trial, not at a summary judgment determination.

¶57 Eighth, the trial court found that, whatever Mira did or did not say at closing was irrelevant because the purchasers had already signed contracts prior to closing. However, there is a difference between "under contract" and "sold." A purchaser who breaches a contract without a legally justified reason is liable for damages, but a purchaser who discovers that a property could not fulfill its intended and represented purpose may have a valid legal reason not to complete the sale.

¶58 Discovering fraud could be a legally justified reason for failing to close on a contract. There is evidence that Mira discouraged purchasers from retaining an attorney. Roggenbuck, one of the purchasers, testified that she did not have an attorney at closing because "Mira told me that I didn't need to have an attorney present because everything was already done, and she would walk me through it all. And also it would save me money if I didn't have an attorney present." At her deposition, Mira denied having said that and denied recalling whether most of the Legacy

Dunes purchasers lacked attorneys. It would appear that the trial court is making a credibility determination in believing Mira's testimony over that of the purchaser. To keep the purchaser from retaining an attorney would help to insure that the fraud was not discovered. Again, we have factual determinations that need to be made which support the denial of a motion for summary judgment.

¶59 At this stage, all plaintiffs have to do is show a genuine issue concerning a material fact and they have accomplished that objective concerning knowledge and participation by an employee of Stewart. Summary judgment is a drastic measure that should be granted only when the movant's right to the judgment is free and clear from doubt. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). Mira's deposition testimony contradicted the deposition testimony of Julie Ferrarini—who Mira testified was her boss—about whether the Stewart closers knew the properties were intended as investment properties. This contradiction between defendant's *own* employees concerning a major fact in the case indicates that this case was not a good candidate for the drastic measure of summary judgment and, as discussed above, this is only one of the many pieces of evidence which, taken together, calls the grant of summary judgment into question.

¶60 We are required to draw all reasonable inferences in favor of the nonmovant. *Shuttlesworth v. City of Chicago*, 377 Ill. App. 3d 360, 366 (2007) ("The court must strictly construe the record before it against the movant and in favor of the nonmovant, drawing all reasonable inferences in favor of the nonmovant."). See also *Outboard Marine*, 154 Ill. 2d at 102 ("Where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied.").

¶61 I do not believe the trial court did this. The trial court assumed that Mira did not know the ramifications of the second home rider. However, Mira testified that she went to "real estate school" and passed an exam to obtain a realtor's license. In addition, Roggenbuck, one of the purchasers, testified that she discussed with Mira whether the property was an income property or a second home, and that Mira suggested that the purchaser "would get a lower rate by doing it as a second home versus an income property on [her] mortgage." Thus, it is incorrect to presume that Mira did not understand the ramifications of a second home rider.

¶62 In this case, we owe no deference at all to the trial court's decision. Our standard of review is *de novo*, which means we perform the same analysis that a trial judge would perform. *Motorola Solutions, Inc. v. Zurich Insurance Co.*, 2017 IL App (1st) 161465, ¶ 18. Having performed my own independent analysis of the rather voluminous record, I agree that we must reverse the trial court's grant of summary judgment because important factual issues are present that need to be decided; and, thus, I specially concur for the reasons stated here.