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**IN THE
COURT OF APPEALS OF INDIANA**

BOBBIE L. RUBLE and)
MARLENE K. RUBLE,)
)
Appellants-Respondents,)

vs.)

No. 67A01-0601-CV-4)

NATIONAL CITY BANK OF INDIANA,)
)
Appellee-Petitioner.)

APPEAL FROM THE PUTNAM CIRCUIT COURT
The Honorable Matthew L. Headley, Judge
Cause No. 67C01-0504-CC-119

August 31, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Chief Judge

Bobbie L. Ruble and Marlene K. Ruble (“the Rubles”) appeal from an action foreclosing a mortgage on their personal residence. They raise several issues, which we consolidate and restate as whether the trial court abused its discretion when it denied their motion to correct error.

We affirm.

FACTS AND PROCEDURAL HISTORY

On May 1, 2003, National City Bank of Indiana (“National City”) made a loan to the Rubles on a promissory note in the principal amount of \$269,700.00. The loan was secured by a mortgage on the Rubles’ personal residence, located at 959 East County Road 825 North, Bainbridge, Indiana (“the Residence”). The Rubles defaulted under the terms of the note because they failed to make payment to National City. National City then exercised its option to accelerate the debt and declare the entire debt due. As of June 29, 2005, the Rubles were indebted to National City in the sum of \$277,547.99. This amount included principal, interest, and late fees, with interest continuing to accrue. Under the terms of the note, National City was also entitled to recover reasonable attorney fees and all other cost of collection.

On April 26, 2005, National City filed its complaint against the Rubles, seeking judgment on the note and foreclosure of the mortgage on the Residence. The Rubles filed their answer to the complaint on June 20, 2005. On July 7, 2005, National City filed a motion for summary judgment and designation of evidence. On July 11, 2005, the trial court set the matter for hearing on September 2, 2005. On August 5, 2005, the Rubles filed a motion for an extension of time in order to respond to the motion for summary judgment,

which was granted by the trial court. On August 15, 2005, they requested an additional extension of time and also served discovery requests on National City. National City objected to the Rubles' motion for extension of time, and the trial court denied the motion.

On September 2, 2005, a hearing was held on National City's motion for summary judgment although the Rubles had not yet filed a response. At the hearing, the Rubles orally moved that the trial court reconsider its previous denial of their second motion for extension of time. After allowing the Rubles to argue the motion, the trial court again declined to allow a second extension of time. At the conclusion of the hearing, the trial court granted National City's motion for summary judgment. Both Marlene and Bobbie filed separate motions to correct error with attached affidavits, arguing that the entry of summary judgment was erroneous. National City filed motions to strike the affidavits. On October 25, 2005, the trial court denied the Rubles' motion to correct error and granted National City's motions to strike the affidavits. The Rubles now appeal.

DISCUSSION AND DECISION

The grant or denial of a motion to correct error is within the broad discretion of the trial court. *Hawkins v. Cannon*, 826 N.E.2d 658, 663 (Ind. Ct. App. 2005), *trans. denied*. We will only reverse upon an abuse of that discretion. *Id.* An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it. *Id.*

The Rubles argue that the trial court abused its discretion when it denied their motions to correct error because prejudicial and harmful error was committed when the trial court granted National City's motion for summary judgment and denied their motion for extension

of time. They specifically contend that the trial court erred in granting summary judgment and denying the motion for extension of time because the discovery requests that they had served on National City were still pending.

Under Ind. Trial Rule 56(I), a trial court may alter any time limit set forth in T.R. 56 upon a motion made within the applicable time limit and with cause found. Here, the Rubles did not establish cause to extend the time limit further. On August 5, 2005, the Rubles filed a motion for extension of time, which was granted, and they were given until August 15 to file a response. On August 15, the Rubles filed a second motion for extension of time and their first discovery requests, which sought the production of documents. In their motion, the Rubles claim that the discovery was necessary to respond to National City's motion for summary judgment. They failed to explain, however, why the discovery was necessary or why they had delayed several months in seeking the discovery. While they claimed that the note and mortgage here at issue were related to another, larger financial transaction, they failed to state that they had been involved for several months in litigation related to the other transaction and had conducted discovery in that litigation. Thus, the trial court was within its discretion in concluding that the Rubles had failed to establish cause for altering the time limits set out in T.R. 56 and in denying their second motion for extension of time. Because the Rubles failed to respond to National City's motion for summary judgment and failed to designate any evidence in opposition to the motion, the trial court did not err in granting summary judgment for National City.

The Rubles also claim that they were prejudiced because there were errors in the execution of the note and mortgage. Bobbie claims that when he signed the documents he

did not intend to give a mortgage on the Residence, and Marlene asserts that the signature that appears on the documents is not hers. To support their arguments, the Rubles filed affidavits with their motions to correct error. Generally, error cannot be based upon evidence that was not before the trial court at the time of summary judgment. *Babinchak v. Town of Chesterton*, 598 N.E.2d 1099, 1102 (Ind. Ct. App. 1992). “An exception exists in the case of newly discovered evidence which may, by affidavit, be asserted upon the motion to correct error if the proponent could not, with reasonable diligence, have earlier discovered and produced such evidence.” *Id.* at 1103.

In this case, the affidavits appended to the Rubles’ motions did not contain newly discovered evidence, nor do they so argue. Nor do they set forth any reason why the affidavits filed with their motions to correct error could not have been timely filed in opposition to National City’s motion for summary judgment. Marlene’s affidavit indicates for the first time during the proceedings that the signature that appears on the documents is not hers. Bobbie’s affidavit contains his contention that he did not know or intend that a mortgage was being granted against the Residence. Although the evidence in their affidavits would have been sufficient to defend against the summary judgment motion had the affidavits been timely filed, all of this information was evidence that was within the Rubles’ knowledge prior to the summary judgment hearing and did not depend on their discovery requests. Therefore, the trial court could not have properly considered the evidence in the motion to correct error and properly struck the Rubles’ affidavits.

Additionally, the Rubles’ claims regarding execution of the note and mortgage were not presented in a timely fashion. T.R. 9.2(B) reads in pertinent part,

When a pleading is founded on a written instrument and the instrument or a copy thereof is included in or filed with the pleading, execution of such instrument, indorsement, or assignment shall be deemed to be established and the instrument, if otherwise admissible, shall be deemed admitted into evidence in the action without proving its execution unless execution be denied under oath in the responsive pleading or by an affidavit filed therewith.

“‘Execution’ of a written instrument includes the requirement that the signature ‘was made with express, implied or apparent authority and was not forged.’” *Miller v. NBD Bank, N.A.*, 701 N.E.2d 282, 285 (Ind. Ct. App. 1998) (quoting T.R. 9.2(H)(1)). In order to deny execution of the note and mortgage, the Rubles were required to do so under oath in their answer to National City’s complaint or in an affidavit, which they did not do. Therefore, the execution of both the note and mortgage was deemed established, and the Rubles’ attempt to argue improper execution in their motions to correct error was not timely. The Rubles have failed to show that they were prejudiced by the grant of summary judgment and the denial of their motion for extension of time, and the trial court did not abuse its discretion when it denied their motions to correct error.

Affirmed.

BAILEY, J., and CRONE, J., concur.