ATTORNEY FOR APPELLANT PAUL TERRAULT

Jeffrey S. Wrage
Blachly, Tabor, Bozik & Hartman, LLC
Valparaiso, Indiana

ATTORNEYS FOR APPELLANT GARY COMMUNITY SCHOOL CORPORATION

Shelice R. Tolbert
Michael E. Tolbert
Candace C. Williams
Tolbert & Tolbert, LLC
Gary, Indiana

ATTORNEYS FOR APPELLEE

Michael Ray Smith
Morgan B. Bick
Hand Ponist Smith & Rayl, LLC
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Paul Terrault and Gary Community School Corporation,

Appellants,

v.

Jean-Christophe Scheere, et al.,

Appellees.

December 15, 2022

Court of Appeals Case No. 22A-PL-914

Appeal from the Porter Superior Court

The Honorable Mary A. DeBoer, Judge

Trial Court Cause No. 64D05-1911-PL-11180

Brown, Judge.

[1] Paul Terrault and Gary Community School Corporation (the "School") appeal the trial court's entry of partial summary judgment in favor of Jean-Christopher Scheere. We affirm, finding the notice provision in the statute in question to be directory rather than mandatory.

Facts and Procedural History

[2] On January 19, 2019, Kraft Auction Service LLC ("Kraft Auction") held an auction at which it placed for sale a scaled model of a Picasso sculpture which had been donated to the School. Jean-Christophe Scheere participated in the bidding by telephone and placed the highest bid of $20,000, and auctioneer Jonathan Kraft ("Kraft") announced the item as sold. On January 22, 2019, Kraft sent an email to Scheere congratulating him on winning the model and providing payment information, and Scheere replied on January 23, 2019, stating that his bank had sent the funds. Scheere wired $23,000 which covered his bid of $20,000 and a $3,000 buyer's premium.

[3] On February 12, 2019, Kraft sent an email to Scheere stating, "[s]o because the state is running the school system, any items that the school wants to sell they have to notify the mayor of the city," the person running the school system "did not give proper notice to the mayor like she was supposed to," "we have talked to the Mayor and they are not wanting the piece," and "[t]he notice to the

mayor is a curtsey [sic] gesture really and she cannot stop the sale."[1] Appellants' Appendix Volume IV at 117. On March 14, 2019, Kraft sent another email to Scheere stating "the new emergency manager and mayor told me to post the Picasso back on my website" and "[i]t has actually been on there for about 10 days now and anyone [wishing] to submit a bid has until tomorrow." *Id*. at 121. On March 15, 2019, Terrault submitted a bid of approximately $40,500, and he later made payment to the School and picked up the model.

[4] In November 2019, Scheere initiated this lawsuit to obtain possession of the model. In September 2021, Scheere filed a Third Amended Complaint alleging the January 19, 2019 auction and sale to him were valid. He raised several claims including: Count I, breach of contract against the School; Count II, action in replevin against Terrault; Count III, civil conversion against the School, Kraft Auction, and Kraft; Count IV, civil conversion against Terrault; Count V, action under the Crime Victims' Relief Act (the "CVRA") against Kraft Auction and Kraft; Count VI, action under the CVRA against Terrault; Count VII, fraud against Kraft Auction and Kraft; Count VIII, constructive

---

[1] Ind. Code § 6-1.1-20.3-8.5(b)(12) relates to the sale of assets of a distressed political subdivision and provides in part:

> In the case of an emergency manager appointed for the Gary Community School Corporation, the emergency manager shall provide written notice to the mayor of the city of Gary at least thirty (30) days before selling assets under this subdivision. If the mayor of the city of Gary notifies the emergency manager of any concerns or objections regarding the proposed sale of the asset, the emergency manager must confer with the mayor regarding those concerns or objections.

Ind. Code § 6-1.1-20.3-8.5(b)(16) contains a similar provision related to the transfer of property.

fraud against Kraft Auction and Kraft; Count IX, declaratory judgment against Terrault; and Count X, money had and received against Kraft Auction and the School.[2] In November 2021, Scheere moved for summary judgment with respect to Counts I, II, and IX of his complaint and requested a judgment for delivery of possession of the model to him. Terrault, Kraft Auction, and Kraft also moved for summary judgment. In March 2022, the court held a hearing.

[5] On April 5, 2022, the court issued an amended order of over forty pages. The court found that the School was designated as a distressed political subdivision, the Distressed Unit Appeal Board ("DUAB") entered into an agreement with Gary Schools Recovery, LLC, to serve as the emergency manager (the "EM") of the School, and Kraft Auction and the School entered into an Auction Services Contract pursuant to which the School contracted with Kraft Auction to sell its personal property. It found: "Prior to the January 2019 auction, the Mayor of Gary was notified of [the] sale. However, all parties now acknowledge the Mayor of Gary did not receive 30-days advance written notice of the sale of the model, specifically." Appellants' Appendix Volume VII at 160. The court found that the auction ended on January 19, 2019, and that, when the bidding closed, Scheere's bid was the highest. It found the School approved the sale of the model at auction, and "Kraft proceeded to advertise

[2] The parties filed cross-claims and counterclaims which are not at issue.

the sale of the model, register potential bidders for the model,[3] conduct an auction in which the model was featured for sale, accept bids related to the model, and close the bidding for the model with Scheere being the highest bidder."[4] *Id*. at 169.

[6] As for the thirty-day notice provision in Ind. Code § 6-1.1-20.3-8.5, the court found the statute "does not indicate any consequence to the sale of the School's assets if the Mayor is not provided 30 days advance notice." *Id*. at 170. It noted the statute has language regarding the sale of real property which suggests that, although there is a notice requirement to obtain offers for the sale of real property, the EM has the ultimate authority to determine whether the offers

---

[3] When registering to participate in the January 19, 2019 auction, Scheere agreed to Kraft Auction's terms and conditions which included the following:

> AT THE SALE
>
> * * * * *
>
> Auctioneer's Discretion
>
> The auctioneer has the right at his or her absolute and sole discretion to refuse any bid, to advance the bidding in such manner as he or she may decide, to withdraw any lot, and in the case of error or dispute, and whether during or after the sale, to determine the successful bidder, to continue the bidding, to cancel the sale or to reoffer and resell the item in dispute. If any dispute arises after the sale, our sale record is conclusive.
>
> Successful Bid
>
> The highest bidder acknowledged by the auctioneer will be the purchaser. In the case of tie bid, the winning bidder will [be] determined by the auctioneer at his or her sole discretion. In the event of dispute between bidders, the auctioneer has final discretion to determine the successful bidder or to reoffer the lot in dispute. If any dispute arises after the sale, the Kraft Auction Service LLC, sale record shall be conclusive. Title passes upon the fall of the auctioneer's hammer to the highest acknowledged bidder subject to the Conditions of Sale set forth herein, and the bidder assumes full risk and responsibility.

Appellants' Appendix Volume IV at 197-198.

[4] Ind. Code § 26-1-2-328(2) provides in part that "[a] sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner."

submitted should be accepted and there is no language that the sale is invalid or void if notice is not provided. It found "the statute does not preclude the EM from selling the asset despite any concerns or objections voiced by the mayor. Nor does the statute invalidate or make void any sale made upon discovery that proper notice was not given." *Id*. at 171. It also observed "[t]he power bestowed upon the EM is extensive" and the EM "is tasked with many duties, including selling and transferring real and personal property no longer needed by the School." *Id*. The court determined that "a review of subsection (b) suggests that the legislature did not intend the notice requirement to be essential to the validity of the EM's final decision to place an asset up for sale and that the notice requirement is directory rather than mandatory." *Id*. The court concluded the EM had authority to contract with Kraft Auction to auction School assets including the model, Kraft was an agent of the School with authority to sell the model despite the School's failure to provide the Mayor of Gary with notice of thirty days, the sale of the model to Scheere on January 19, 2019 was a valid sale, and Scheere is the rightful owner of the model.

[7] The trial court entered an order which granted summary judgment in favor of Scheere on Counts I, II, and IX of his Third Amended Complaint, granted summary judgment in favor of Kraft Auction and Kraft on Count V of Scheere's Third Amended Complaint, and ordered Terrault to relinquish possession of the model to Scheere.

Discussion

[8] Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mangold ex rel. Mangold v. Ind. Dep't of Natural Resources*, 756 N.E.2d 970, 973 (Ind. 2001). We may affirm on any grounds supported by the Trial Rule 56 materials. *Catt v. Bd. of Comm'rs of Knox Cnty.*, 779 N.E.2d 1, 3 (Ind. 2002). A trial court's grant of summary judgment is clothed with a presumption of validity. *Lowrey v. SCI Funeral Servs., Inc.*, 163 N.E.3d 857, 860 (Ind. Ct. App. 2021), *trans. denied*. The fact the parties make cross-motions for summary judgment does not alter our standard of review. *Sterling Commercial Credit-Mich., LLC v. Hammert's Iron Works, Inc.*, 998 N.E.2d 752, 756 (Ind. Ct. App. 2013).

[9] The School and Terrault challenge the entry of partial summary judgment. The School argues the thirty-day notice requirement in Ind. Code § 6-1.1-20.3-8.5 is mandatory, the statute uses the word "shall," the inadequate notice to the City of Gary invalidated the January 19, 2019 auction, and therefore the School did not have a contract with Scheere and there could be no breach of contract. Terrault argues that Scheere agreed to allow bidding to continue if an error occurred and points to the terms and conditions to which Scheere agreed when he registered to participate in the auction. He argues that the EM made an error in failing to comply with the notice requirement and that, to correct the error, the EM made a reasonable decision to extend and reopen the bidding.

[10] Scheere maintains that Kraft Auction had authority to sell the model on behalf of the School, the notice provision in Ind. Code § 6-1.1-20.3-8.5 was not

mandatory, the notice provision was unconstitutional as a special law, and the failure to notify the Mayor was not fatal to the EM's authority to sell the School's property. He also argues the terms to which he agreed related to the auctioneer's power to control the conduct of the sale and did not authorize the School to cancel a sale or reopen bidding. Terrault and the School reply that Scheere did not raise any constitutional claim before the trial court.

[11] If a contract's terms are clear and unambiguous, courts must give those terms their clear and ordinary meaning. *Jernas v. Gumz*, 53 N.E.3d 434, 444 (Ind. Ct. App. 2016), *trans. denied*. Our paramount goal is to ascertain and effectuate the intent of the parties. *Id.* This requires the contract to be read as a whole. *Id*. We also note that contracts are formed when parties exchange an offer and acceptance. *Id*. at 445. The basic requirements for a contract are offer, acceptance, consideration, and a meeting of the minds between the contracting parties on all essential elements or terms of the transaction. *Id*.

[12] With respect to interpreting a statute, we independently review a statute's meaning and apply it to the facts of the case under review. *Bolin v. Wingert*, 764 N.E.2d 201, 204 (Ind. 2002). If a statute is unambiguous, we give the statute its clear and plain meaning. *Id.* If a statute is susceptible to multiple interpretations, we try to ascertain the legislature's intent and interpret the statute so as to effectuate that intent. *Id*. We presume the legislature intended logical application of the language used in a statute so as to avoid unjust or absurd results. *Id.* A statute should be examined as a whole, avoiding

excessive reliance upon a strict literal meaning or the selective reading of individual words. *Mayes v. Second Injury Fund*, 888 N.E.2d 773, 776 (Ind. 2008).

[13] Ind. Code § 6-1.1-20.3-8.5(b) provides in part:

> Notwithstanding any other law, an emergency manager of a distressed political subdivision appointed under this chapter shall assume and exercise all of the power, authority, and responsibilities of both the executive and the fiscal body of the political subdivision during the time the political subdivision is a distressed political subdivision. An emergency manager's power, authority, and responsibilities include the following:
>
> * * * * *
>
> (12) Selling assets, including real property, of the distressed political subdivision. If real property is being sold, any political subdivision that has territory where the real property is located and institutions of higher education with real property located in Indiana shall be given a thirty (30) day first right to make an offer to purchase the real property. The emergency manager shall determine whether it is appropriate to accept one (1) of these offers and shall negotiate the terms and conditions of the sale of the real property to the offeror. In the case of an emergency manager appointed for the Gary Community School Corporation, the emergency manager shall provide written notice to the mayor of the city of Gary at least thirty (30) days before selling assets under this subdivision. If the mayor of the city of Gary notifies the emergency manager of any concerns or objections regarding the proposed sale of the asset, the emergency manager must confer with the mayor regarding those concerns or objections.
>
> * * * * *
>
> (16) Transferring property not needed by the distressed political subdivision. In the case of an emergency manager appointed for the Gary Community School Corporation, the emergency manager shall provide written notice to the mayor of the city of

> Gary at least thirty (30) days before transferring property under this subdivision. If the mayor of the city of Gary notifies the emergency manager of any concerns or objections regarding the proposed transfer of the property, the emergency manager must confer with the mayor regarding those concerns or objections.

[14] The trial court reviewed the language of Ind. Code § 6-1.1-20.3-8.5(b), determined the legislature intended the notice provision to be directory rather than mandatory, found the EM had the authority to contract with Kraft Auction to sell School assets, and concluded that, despite the failure to provide the Mayor with notice of thirty days, the sale to Scheere on January 19, 2019 was valid. We agree with the court's determination.

[15] The record reveals a Professional Services Contract between the DUAB and the EM providing that the EM shall provide the services described in an Attachment A. The attachment, in turn, set forth the scope of services for the EM and included headings for statutory responsibilities, fiscal resources, staffing, engagement with stakeholders, analysis and reporting, and other duties. Under the heading for statutory responsibilities, the attachment provided that the EM shall assume and exercise all of the power, authority, and responsibilities of both the superintendent as the corporation's executive and its board of trustees as its fiscal body, may set salaries and outsource services, may approve or disapprove of contracts, expenditures, and loans, may close facilities of the School, may acquire real property, and may sell assets of the School and transfer property not needed by the School. The record further reveals that

Scheere, in registering to participate in the January 19, 2019 auction, agreed to Kraft Auction's terms and conditions.

[16] While a statute containing the term "shall" generally connotes a mandatory as opposed to a directory import, the term "shall" may be construed as directory instead of mandatory "to prevent the defeat of the legislative intent." *Hancock Cnty. Rural Elec. Membership Corp. v. City of Greenfield*, 494 N.E.2d 1294, 1295 (Ind. Ct. App. 1986) (citations omitted), *reh'g denied*, *trans. denied*. In *Allen Cnty. Dep't of Pub. Welfare v. Ball Mem'l Hosp. Ass'n*, 253 Ind. 179, 252 N.E.2d 424 (1969), the Indiana Supreme Court addressed the construction of "shall" in a directory sense. *Hancock Cnty.*, 494 N.E.2d at 1295. The Court interpreted a statute stating that a hospital "shall within seventy-two hours" report the admission of an indigent to the county welfare department. *Id*. "The distinction between directory and mandatory provisions in a statute is that violation of the former is not usually fatal to the procedure, while a departure from the latter is fatal to any proceeding to obtain the benefit of the statute." *Id*. (citing *Ball Memorial*, 253 Ind. at 185, 252 N.E.2d at 427). The Court "examined not only the statute's phraseology but also the statute's design and nature, and the consequences flowing from different interpretations." *Id.* (citing *Ball Memorial*, 253 Ind. at 185, 252 N.E.2d at 427). The Court held that time provisions in a statute were not to be regarded "as of the essence, but [were] regarded as directory merely." *Id.* (citing *Ball Memorial*, 253 Ind. at 185, 252 N.E.2d at 427 (quoting 50 AM. JUR. 2D *Statutes* § 23 (1944))). The Court noted the absurd consequences of a mandatory interpretation, recognized "the

harshness and mischief caused by strict adherence to a [mandatory] rule," and held that the statute was directory, not mandatory. *Id*. at 1295-1296 (citing *Ball Memorial*, 253 Ind. at 186, 252 N.E.2d at 428). The Court held that "inasmuch as the statute contains no negative or prohibitive words nor provides for penalties on the consequences of notice given beyond the seventy-two hour period, it is directory with respect to the time limitation." *Id*. at 1296 (citing *Ball Memorial*, 253 Ind. at 187, 252 N.E.2d at 428). *See also Hawley v. S. Bend Dep't of Redevelopment*, 270 Ind. 109, 116-117, 383 N.E.2d 333, 338-339 (1978) (applying the *Ball Memorial* analysis and holding a statute requiring two appraisals was directory rather than mandatory), *reh'g denied*.

[17] In *Hancock Cnty*., this Court addressed whether the word "shall" in a statute providing that the Public Service Commission shall rule on a petition within ninety days of its filing was mandatory or directory. 494 N.E.2d at 1295. We noted that other jurisdictions "propound a directory approach to statutory time limits if to do otherwise would contradict legislative purpose."[5] *Id*. at 1296. The Court observed the statute at issue "neither purports to restrain the

[5] The Court cited several cases. *See Hancock Cnty.*, 494 N.E.2d at 1296 (citing *Lomelo v. Mayo*, 204 So.2d 550, 553 (Fla. Ct. App. 1967) ("mandatory words specifying time within which duties . . . are to be performed may be construed as directory only"); *Hartman v. Glenwood Tel. Membership Corp.*, 249 N.W.2d 468, 475 (Neb. 1977) ("shall" was in directory sense in a statutory time limit); *Omaha Public Power Dist. v. Nebraska Pub. Power Project*, 243 N.W.2d 770, 772 (Neb. 1976) (ninety-day provision was "given with a view merely to the proper, orderly and prompt conduct" and thus was directory, not mandatory); *Commonwealth v. Gen. Foods Corp.*, 239 A.2d 359, 362 (Pa. 1968) (sixty-day limit for a decision was directory); *Chisholm v. Bewley Mills*, 287 S.W.2d 943, 945 (Tex. 1956) ("If the statute directs . . . an act to be done within a certain time, the absence of words restraining the doing thereof afterwords or stating the consequences of failure to act within the time specified, may be considered as a circumstance tending to support a directory construction.")).

Commission from acting on the petition after ninety days nor specifies that adverse or invalidating consequences follow." *Id.* It further observed "the provision does not go to the essence of the statutory purpose" and the intent of the language was that the matter should be acted upon promptly and expeditiously. *Id.* It also found that a mandatory construction would frustrate the legislature's purpose and, under such a construction, the Commission would be unable to determine which utility could better serve the interests of the consumers. *Id.* The Court found the phrase concerning the ninety-day period was a directory, not mandatory, provision. *Id.*

[18] Here, while Ind. Code § 6-1.1-20.3-8.5 provides that the EM "shall" provide notice to the Mayor of the City of Gary at least thirty days before selling assets and, if the Mayor objects, the EM "must confer" with the Mayor, the statute does not purport to restrain the EM from acting to sell an asset if the notice was not timely given and indeed does not specify any adverse or invalidating consequences for a failure to provide the notice at least thirty days in advance. We also note the statute does not provide that a sale is invalid, or that the EM is prohibited from completing a contemplated sale, where the Mayor, before or after conferring with the EM, does not approve of the sale. Further, under the circumstances of this case, a mandatory construction would frustrate the broad authority granted to the EM by the legislature with respect to its duty to manage the School's finances, as a review of Ind. Code § 6-1.1-20.3-8.5 makes apparent, including the authority to dispose of and sell the School's personal property. Mindful of these factors, and in light of the statute's language as well

as its design and nature, we find the trial court correctly determined that the phrase concerning the thirty-day notice was a directory, not mandatory, provision. *See Ball Memorial*, 253 Ind. at 185-187, 252 N.E.2d at 427-428; *State v. Langen*, 708 N.E.2d 617, 621 (Ind. Ct. App. 1999) (discussing *Ball Memorial* and *Hancock Cnty*. and holding the phraseology of a statute stating that a final order "shall" be issued within sixty days was directory rather than mandatory).[6]

[19] Further, while the conditions to which Scheere agreed when registering for the auction provided that the auctioneer may determine the successful bidder, continue bidding, cancel the sale, or reoffer an item, they do not provide that the School and Kraft Auction were able to take such actions after the winning bidder was determined. Indeed the terms provide that the highest bidder acknowledged by the auctioneer will be the purchaser and Kraft Auction acknowledged Scheere as the highest bidder and received payment from him. Based on the designated evidence, the EM and Kraft Auction had the authority to sell the model on behalf of the School, and the sale of the model on January 19, 2019, to Scheere was valid. We do not disturb the trial court's entry of partial summary judgment.

[20] For the foregoing reasons, we affirm the trial court.

---

[6] As we find the thirty-day notice provision in Ind. Code § 6-1.1-20.3-8.5 to be directory rather than mandatory and does not require reversal, we need not address whether the provision constitutes an unconstitutional special law.

[21] Affirmed.

Altice, J., and Tavitas, J., concur.