MEMORANDUM DECISION

APPELLANT, PRO SE

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IN THE COURT OF APPEALS OF INDIANA

Dwayne Gray,
Appellant-Plaintiff,

v.

Three Fountains West Cooperative, Inc.,
Appellee-Defendant.

April 28, 2021

Court of Appeals Case No. 20A-PL-1739

Appeal from the Marion Superior Court

The Honorable Gary Miller, Judge

Trial Court Cause No. 49D03-1702-PL-5757

Pyle, Judge.

Statement of the Case

[1] Dwayne Gray ("Gray"), pro se, appeals the trial court's grant of summary judgment in favor of Three Fountains West Cooperative, Inc. ("the Cooperative"). Gray raises two issues, which we consolidate into whether the trial court erred in granting summary judgment in favor of the Cooperative. Concluding that the trial court did not err, we affirm the grant of the Cooperative's motion for summary judgment.

[2] We affirm.

Issue

Whether the trial court erred in granting summary judgment in favor of the Cooperative.

Facts

[3] The Cooperative operates a cooperative housing project in Indianapolis. The housing project consists of residential dwelling units. The cooperative residents pay monthly "Housing Charges," which pay for the project's operating expenses, taxes, maintenance costs, and other various expenditures. (App. Vol. 2 at 25). On February 25, 2010, the Cooperative and Gray executed an Occupancy Agreement ("Occupancy Agreement"), pursuant to which Gray and his wife became holders of a certificate of membership of the cooperative and agreed to occupy a unit in the cooperative housing project.

[4] In August 2015, Gray's unit suffered a leak, which caused damage to Gray's personal property. Gray submitted a claim pursuant to his rental insurance policy with State Farm Fire & Casualty Co. ("State Farm"). In response, State Farm requested detailed documentation of the damages and replacement costs for the damaged items. Gray failed to provide State Farm with the requested documents.

[5] Thereafter, in October 2015, Gray filed a pro se suit against PPS of Indiana, LLC ("PPS"), the entity that he alleged had caused the damage to Gray's personal property, and State Farm in small claims court. Following a bench trial in small claims court, the court entered judgment in favor of Gray in the amount of $927. The small claims court ordered PPS to pay Gray's deductible of $500 and ordered State Farm to pay the remainder of $427.

[6] Thereafter, Gray sought a trial de novo in Marion Superior Court in February 2017. Gray's complaint alleged that State Farm had acted in bad faith and had breached its insurance contract with Gray. The complaint also contained a negligence claim against PPS.

[7] On October 13, 2017, State Farm filed a motion for summary judgment. State Farm argued it was entitled to judgment as a matter of law because Gray had breached the renter's insurance policy by failing to comply with the provisions requiring production of documentation following a loss and by violating the policy provision concerning suit against State Farm. *See Gray v. PPS of Indiana, LLC and State Farm Fire and Casualty Co.*, No. 49A02-1712-PL-2799 (Ind. Ct.

App. Sept. 17, 2018), *trans. denied*. In response, Gray filed a motion for summary judgment. On November 15, 2017, the trial court granted State Farm's motion for summary judgment. On November 28, 2017, the trial court denied Gray's motion for summary judgment. Gray appealed the trial court's grant of summary judgment in favor of State Farm, and this Court affirmed the trial court's judgment. *See id.* Gray's petition for transfer was denied.

[8] On October 25, 2018, Gray amended his complaint to substitute the Cooperative for PPS as the defendant. The amended complaint alleged that the Cooperative's negligence caused damage to Gray's personal property. Specifically, Gray alleged that a Cooperative employee had been working on plumbing and had broken a pipe which spread sewage onto his personal property. The Cooperative filed an answer to Gray's amended complaint, denying the allegations and asserting that Gray's claim was barred by the Occupancy Agreement.

[9] On July 23, 2020, the Cooperative moved for summary judgment. In support of its motion, the Cooperative designated the following evidence: (1) Affidavit of Ken Jones, who was the State Farm claim manager assigned to Gray's claim; (2) Gray's complaint and amended complaint; (3) the Occupancy Agreement; and (4) a certified copy of the renters policy between Gray and State Farm.[1]

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[1] As we will discuss later, Gray failed to include the Cooperative's designated evidence in his Appendix. *See* Ind. Appellate Rule 50(A)(2). Additionally, the Cooperative did not file an Appellee's Appendix. *See* App. R. 50(A)(3). Nevertheless, we located the designated evidence through the Odyssey system. *See* App. R. 27

The Cooperative noted that the relevant provisions of the Occupancy Agreement provided as follows:

> Article 9. Management, Taxes and Insurance
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> The Cooperative shall provide necessary management, operation and administration of the project; pay or provide for the payment of all taxes or assessments levied against the project; procure and pay or provide for the payment of fire insurance and extended coverage, and other insurance as required by any mortgage on property in the project, and such other insurance as the Cooperative may deem advisable on the property owned by the community. **The Cooperative will not, however, provide insurance on the Member's interest in the dwelling unit on his/her personal property**.
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> * * *
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> Article 15. Effect of Fire Loss on Interest of Members
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> **The Member shall be responsible for insuring his/her personal property in the event of loss or damage by fire or other casualty normally covered by fire and extended coverage insurance or by a renter's insurance policy**.
>
> If a portion of the dwelling unit is damaged by fire or other casualty covered by fire and extended risk value insurance to an extent not in excess of fifty percent (50%) of the value of the dwelling unit and such damage shall not have been occasioned as a result of any act of negligence on the part of the Member, then the Cooperative shall, at the Cooperative's expense, cause the dwelling unit to be promptly repaired and restored to substantially the same condition as it was before such casualty. In the event that the dwelling unit is damaged or that it is unfit for occupancy, the Carrying Charges shall abate for that period of time during

("The Record on Appeal shall consist of the Clerk's Record and all proceedings before the trial court . . . whether or not transcribed or transmitted to the Court on Appeal.").

> which the premises are not habitable and shall continue to abate until restoration has been completed.

(App. Vol. 2 at 28, 32) (emphases added). The Cooperative argued it was entitled to judgment as a matter of law because Gray's claim was ultimately for personal property damage, which Gray agreed to and did insure by purchasing a renters insurance policy from State Farm. Therefore, according to the Cooperative, Gray's claim was barred by the agreement-to-insure provision in the Occupancy Agreement. Gray filed a response in opposition to the Cooperative's motion wherein he recited various lines of case law concerning contracts and motions for summary judgment. On August 26, 2020, the trial court granted the Cooperative's motion for summary judgment. Gray now appeals.

Decision

[10] We begin our analysis by observing that one who proceeds pro se is "held to the same legal standards as licensed attorneys." *Basic v. Amouri*, 58 N.E.3d 980, 983 (Ind. Ct. App. 2016), *reh'g denied*. This means that pro se litigants are bound to follow the established rules of procedure and must be prepared to accept the consequences of their failure to do so. *Id*. at 983-84. These consequences include waiver for failure to present cogent argument on appeal. *Id*. at 984.

[11] On appeal, Gray makes a broad assertion that the trial court erred by granting the Cooperative's motion for summary judgment. He, however, makes no

argument explaining how or why the trial court's grant of summary judgment was erroneous. Instead, Gray's argument section consists of a recitation of various lines of case law concerning contracts, motions for summary judgment, and articles nine and fifteen of the Occupancy Agreement. Thus, we conclude that Gray has waived his argument on appeal for failure to make a cogent argument.[2] *See Thacker v. Wentzel*, 797 N.E.2d 342, 345 (Ind. Ct. App. 2003) (concluding that appellant waived summary judgment challenge where his unsupported assertions were "too poorly developed to be understood.").

[12] Waiver notwithstanding, Gray appeals following the trial court's grant of summary judgment in favor of the Cooperative. We review summary judgment de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). Summary judgment is appropriate only if the designated evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Sedam v. 2JR Pizza Enters.*, LLC, 84 N.E.3d 1174, 1176 (Ind. 2017). The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that the moving party is

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[2] The Cooperative argues that we should dismiss this appeal because of Gray's noncompliance with Indiana Appellate Rule 50 due to his failure to include the evidence it had designated in support of its motion for summary judgment in the appendix. The purpose of the appendix in civil appeals is to provide us "only those parts of the record on appeal that are necessary for the Court to decide the issues presented." App. R. 50(A)(1). "The appellant's Appendix shall contain . . . copies of the following documents . . . (f) pleadings and other documents from the Clerk's Record in chronological order that are necessary for resolution of the issues raised on appeal[.]" App. R. 50(A)(2)(f). As we have often noted, however, we prefer to dispose of cases on their merits when possible. *Hughes v. King*, 808 N.E.2d 146, 147 (Ind. Ct. App. 2004). Accordingly, despite Gray's noncompliance, we exercise our discretion and decide the issue on the merits.

entitled to judgment as a matter of law. *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016). Once these two requirements are met by the moving party, the burden then shifts to the non-moving party to show the existence of a genuine issue by setting forth specifically designated facts. *Id*.

[13] On appeal, the non-moving party carries the burden of persuading us that the grant of summary judgment was erroneous. *Perkins v. Fillio*, 119 N.E.3d 1106, 1110 (Ind. Ct. App. 2019). A trial court's grant of a motion for summary judgment comes to us clothed with a presumption of validity. *Id*. A grant of summary judgment will be affirmed if it is sustainable upon any theory supported by the designated evidence. *Miller v. Danz*, 36 N.E.3d 455, 456 (Ind. 2015).

[14] The resolution of this case requires that we examine that nature of cooperative housing projects and the agreement-to-insure provision in the Occupancy Agreement. This Court has previously explained that "[c]ooperative housing plans are sui generis: they are often referred to as 'legal hybrids' because they contain elements of both property ownership and leasehold." *Cunningham v. Georgetown Homes, Inc.*, 708 N.E.2d 623, 625 (Ind. Ct. App. 1999). The member will execute an occupancy agreement with the cooperative association, thereby acquiring the exclusive right to occupy a particular unit within the cooperative community. *Id*. This occupancy agreement contains the rights of the members as well as the rules and conditions of the community. *Id*. Accordingly, when a member joins a cooperative, and signs an occupancy agreement, which contains certain conditions, he obligates himself to those conditions. *Id*. at 626.

[15] Here, the Occupancy Agreement between Gray and the Cooperative provided that "[t]he Cooperative will not . . . provide insurance on the Member's interest in the dwelling unit on his/her personal property." (App. Vol. 2 at 28). Further, it included an agreement-to-insure provision, which stated that Gray "shall be responsible for insuring his[] personal property in the event of loss or damage by fire or other casualty normally covered by fire and extended coverage insurance or by a renter's insurance policy." (App. Vol. 2 at 33). An agreement to insure is an agreement to provide both parties with the benefits of insurance. *Morsches Lumber, Inc. v. Probst*, 388 N.E.2d 284, 287 (Ind. Ct. App. 1979). "With agreements to insure, the risk of loss is not intended to be shifted to one of the parties; it is intended to be shifted to an insurance company in return for a premium payment." *Id*.

[16] Turning to the merits of this case, Gray's underlying claim against the Cooperative was ultimately for personal property damage. The Cooperative, as the moving party, had the burden of showing that the Occupancy Agreement precluded Gray's claim. *See Goodwin*, 62 N.E.3d at 386. In support of its motion, the Cooperative designated evidence showing that Gray had signed the Occupancy Agreement wherein he was required to obtain insurance for his personal property. As explained above, the Occupancy Agreement specified that Gray "shall be responsible for insuring his[] personal property in the event of loss or damage by fire or other casualty normally covered by fire and extended coverage insurance or by a renter's insurance policy." (App. Vol. 2 at 33). The Cooperative also designated evidence that Gray had obtained a

$30,000 renter's insurance policy from State Farm to cover his personal property, as well as an affidavit from the State Farm claim manager assigned to Gray's claim. Thereafter, the burden shifted to Gray to establish the existence of a genuine issue of material fact. *See Goodwin*, 62 N.E.3d at 386. Gray's response, similar to his brief on appeal, consisted of various lines of case law. Gray did not include any affidavits or specifically designate any evidence showing the existence of a genuine issue of fact.

[17] Consequently, because Gray agreed to insure his own personal property, and in fact did obtain renter's insurance from State Farm, we conclude the Cooperative is entitled to judgment as a matter of law. Moreover, Gray has failed to overcome his burden of persuading us that the grant of summary judgment was erroneous. Therefore, the trial court did not err, and we affirm the grant of summary judgment in the Cooperative's favor.

[18] Affirmed.

Najam, J., and Tavitas, J., concur.