MEMORANDUM DECISION

ATTORNEY FOR APPELLANTS

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IN THE COURT OF APPEALS OF INDIANA

Walter Bartkowiak,
Appellant-Defendant,

v.

Falcone Realtors,
Appellee-Plaintiff

July 14, 2021

Court of Appeals Case No. 21A-PL-9

Appeal from the St. Joseph Superior Court

The Honorable Jenny Pitts Manier, Judge

Trial Court Cause No. 71D05-1907-PL-272

Tavitas, Judge.

Case Summary

[1] Walter Bartkowiak[1] ("Walter") appeals the trial court's grant of summary judgment to Falcone Realtors ("Falcone"). After Walter and Marilyn Bartkowiak ("the Bartkowiaks") entered into a Listing Contract with Falcone for the sale of their residence, Falcone failed to enter the property on a multiple listing service ("MLS"), and the Bartkowiaks terminated the contract. The trial court found that the Bartkowiaks breached the Listing Contract by terminating the contract and granted summary judgment to Falcone. Finding that Falcone was the first to breach the contract by failing to enter the property on an MLS, we reverse and remand with instructions to enter summary judgment to the Bartkowiaks and for a hearing on damages, if any.

Issue

[2] Walter raises one issue, which we restate as whether the trial court properly granted summary judgment to Falcone on the Bartkowiaks' complaint and Falcone's counterclaim.

Facts

[3] On March 18, 2019, Falcone entered into a Listing Contract with the Bartkowiaks regarding the sale of their residence in South Bend (the "Property"). The term of the Listing Contract was from March 18, 2019, to

[1] Marilyn Bartkowiak died during the trial court proceedings.

July 31, 2019. The Listing Contract gave Falcone the "exclusive right to sell the Property, within the period for the price and terms stated herein." Appellant's App. Vol. II p. 56. Section D of the Listing Contract provided:

D. BROKER SERVICES: BROKER will provide the following services (check all statements that apply). BROKER:

- [X] 1. warrants that REALTOR® holds a valid Indiana real estate license # PB 51269544
- [X] 2. will make an earnest and continued effort to sell the Property in accordance with the terms and conditions of this Contract.
- [X] 3. is a REALTOR® member of GNIAR and/or [ ] is a Participant in the GNIAR Multiple Listing Service (MLS) and will enter detailed information, a photo of the Property, if available, and types of financing acceptable to SELLER into the MLS computer system and all available MLS publications or advertising media, including Internet sites utilized by the MLS. (Print-out of this listing will be readily available to members of MLS by computer and will be provided to other REALTORS® and BROKERS upon request.) SELLER agrees that BROKER will furnish notice to MLS of all changes of information concerning the Property, in accordance with legal requirements, MLS Rules, and the REALTORS® Code of Ethics.
- [X] 4. has given SELLER a written estimate of selling expenses.
- [X] 5. will cooperate with all other REALTORS® and BROKERS in an effort to procure a Purchaser for the Property.
- [X] 6. may advertise the Property utilizing any combination of media options including print, radio, television or Internet and place a "FOR SALE" sign upon the premises.
- [X] 7. to facilitate access to the Property, SELLER will provide BROKER with keys necessary to access the Property. SELLER authorizes BROKER to have duplicate keys made. BROKER will follow SELLER'S instructions for making appointments for the Property to be shown.
- [X] 8. is authorized to install a lockbox, subject to the following acknowledgements/conditions: Sellers will provide keys. SELLER will safeguard valuables. SELLER acknowledges BROKER is not an insurer of SELLER'S real estate and personal property and waives claims against BROKER and BROKER'S authorized persons for loss and/or damage to any property pursuant to showing the Property. SELLER further agrees to indemnify and hold harmless BROKER and all authorized persons from claims by third parties from all loss and/or damage. Where a tenant/lessee occupies the Property, it is SELLER'S full responsibility to obtain tenant/lessee consent to allow the use of a lockbox/key.
- [X] 9. will promptly present all Purchase Agreements received on the Property for SELLER'S consideration and after a Purchase Agreement has been accepted by SELLER, and will continue to present any other Purchase Agreements received until the transaction is closed.
- [X] 10. shall divulge the existence of offers on the property in response to inquiries from buyers or cooperating brokers.
- [X] 11. may place a "SOLD" or a "SALE PENDING" rider upon the sign after a Purchase Agreement has been accepted, and will remove all signs after the transaction has been closed.
- [X] 12. will make arrangements for closing time and place in cooperation with all parties.

Id. At some point, a marking in the second box of Line 16 was removed with "white out." *Id.* at 51. The Listing Contract required the Bartkowiaks to pay Falcone a fee of five percent of the gross sales price of the Property.

[4] An MLS is "a database established by cooperating realtors to provide information about properties for sale in a specific geographic area." *Id.* at 47.

"Generally, popular websites such as realtor.com, trulia.com, and zillow.com pull information from" an MLS. *Id.* Falcone did not list the Property in the MLS. Only a few potential buyers looked at the Property, and the Bartkowiaks did not receive any purchase offers from March 18, 2019, to mid-June 2019.

[5] Due to the Bartkowiaks' poor health and their move into an assisted living facility, their son, Tim Bartkowiak ("Tim"), began handling his parents' affairs. Tim found that the Property was not listed for sale online and unsuccessfully attempted to work with Falcone to list the Property online. On June 10, 2019, Tim sent Falcone a letter terminating the Listing Contract. On June 16, 2019, Bob Falcone, owner of Falcone, left a voicemail message for Tim noting, in part, that the keys and garage door opener for the Property would be in Falcone's mailbox. Tim retrieved the key and garage door opener and believed that the contract was terminated.

[6] On June 17, 2019, Tim entered into a listing contract with another realtor. The Bartkowiaks signed a purchase agreement on June 24, 2019, and sold the Property on August 1, 2019, for $180,000.00. Falcone learned of the sale and demanded payment of the sales commission.

[7] Thereafter, the Bartkowiaks filed a complaint against Falcone for breach of contract. Falcone then filed an answer and counterclaim for breach of contract. Falcone filed a motion for summary judgment and argued that, pursuant to the Listing Contract, Falcone had the exclusive right to sell the Property until July 31, 2019; that the Bartkowiaks entered into a purchase agreement on June 24,

2019, and closed on the sale on August 1, 2019; and that Falcone was entitled to receive five percent of the gross sales price plus attorney fees.

[8] The Bartkowiaks filed a response and a cross-motion for summary judgment. The Bartkowiaks argued that: (1) the parties terminated the Listing Agreement; (2) the Listing Agreement was void as unconscionable and the Bartkowiaks entered into it based upon misrepresentation; and/or (3) Falcone breached the Listing Agreement by failing to enter the Property on the MLS.

[9] After a hearing, the trial court granted summary judgment to Falcone on the Bartkowiaks' complaint and Falcone's counterclaim. The trial court concluded that: (1) the Listing Contract could not be changed except by the parties' "written consent"; and (2) the Bartkowiaks designated no evidence of a written instrument terminating the Listing Contract. *Id.* at 77. The trial court then concluded that Falcone was entitled to recover its commission and attorney fees and entered judgment in the amount of $12,100.00 against the Bartkowiaks. Walter now appeals.

Analysis

[10] Walter appeals the trial court's summary judgment in favor of Falcone on the Bartkowiaks' complaint and Falcone's counterclaim. "When this Court reviews a grant or denial of a motion for summary judgment, we 'stand in the shoes of the trial court.'" *Burton v. Benner*, 140 N.E.3d 848, 851 (Ind. 2020) (quoting *Murray v. Indianapolis Pub. Schs*, 128 N.E.3d 450, 452 (Ind. 2019)). Summary judgment is appropriate "if the designated evidentiary matter shows

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." *Murray*, 128 N.E.3d at 452; *see also* Ind. Trial Rule 56(C). The party moving for summary judgment bears the burden of making a prima facie showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Burton*, 140 N.E.3d at 851. The burden then shifts to the non-moving party to show the existence of a genuine issue. *Id.*

[11] On appellate review, we resolve "[a]ny doubt as to any facts or inferences to be drawn therefrom . . . in favor of the non-moving party." *Id.* We review the trial court's ruling on a motion for summary judgment de novo, and we take "care to ensure that no party is denied his day in court." *Schoettmer v. Wright*, 992 N.E.2d 702, 706 (Ind. 2013). "We limit our review to the materials designated at the trial level." *Gunderson v. State, Indiana Dep't of Nat. Res.*, 90 N.E.3d 1171, 1175 (Ind. 2018), *cert. denied,* 139 S. Ct. 1167 (2019).

[12] We first note that Falcone did not file an appellee's brief. "[W]here, as here, the appellees do not submit a brief on appeal, the appellate court need not develop an argument for the appellees but instead will 'reverse the trial court's judgment if the appellant's brief presents a case of prima facie error.'" *Salyer v. Washington Regular Baptist Church Cemetery*, 141 N.E.3d 384, 386 (Ind. 2020) (quoting *Front Row Motors, LLC v. Jones*, 5 N.E.3d 753, 758 (Ind. 2014)). "Prima facie error in this context means 'at first sight, on first appearance, or on the face of it.'" *Id*. This less stringent standard of review relieves us of the burden of controverting arguments advanced in favor of reversal where that

burden properly rests with the appellee. *See, e.g., Jenkins v. Jenkins*, 17 N.E.3d 350, 352 (Ind. Ct. App. 2014). We are obligated, however, to correctly apply the law to the facts in the record in order to determine whether reversal is required. *Id.*

[13] Walter argues that the trial court erred by granting summary judgment to Falcone, in part, because Falcone breached the Listing Contract by failing to place the Property on the MLS.[2] This argument requires us to interpret the parties' Listing Contract. In interpreting a contract, we "determine the intent of the parties at the time that they made the agreement." *Care Grp. Heart Hosp., LLC v. Sawyer*, 93 N.E.3d 745, 752 (Ind. 2018). "We start with the contract language to determine whether it is ambiguous." *Id*. "If the language is unambiguous, we give it its plain and ordinary meaning in view of the whole contract, without substitution or addition." *Id*. When the contract terms are unambiguous, we do not go beyond the four corners of the contract to investigate meaning. *Id.* at 756. We "determine the meaning of a contract by considering all of its provisions, not individual words, phrases, or paragraphs read alone." *Id.*

[14] "The terms of a contract are ambiguous only when reasonably intelligent persons would honestly differ as to the meaning of those terms." *Perrill v.*

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[2] Walter also argues that: (1) they terminated the Listing Contract, and Falcone acquiesced to the termination; and (2) the Listing Contract was void as unconscionable. Given our resolution of Walter's argument that Falcone breached the Listing Agreement, we need not address the alternative arguments.

Perrill, 126 N.E.3d 834, 841 (Ind. Ct. App. 2019), *trans. denied*. "Only 'reasonable' certainty is necessary; 'absolute certainty in all terms is not required.'" *Allen v. Clarian Health Partners, Inc.*, 980 N.E.2d 306, 310 (Ind. 2012). The parties' disagreement over a term's plain meaning does not itself create ambiguity. *Hartman v. BigInch Fabricators & Constr. Holding Co., Inc.*, 161 N.E.3d 1218, 1223 (Ind. 2021). We review a trial court's interpretation of contract language de novo. *Care Grp. Heart Hosp.*, 93 N.E.3d at 753.

[15] Falcone argued to the trial court that Falcone was not required to "enter detailed information, a photo of the Property, if available, and types of financing acceptable to SELLER into the MLS computer system and all available MLS publications or advertising media, including Internet sites utility by the MLS" unless the second box in Line 16 of the Listing Contract was marked. Appellant's App. Vol. II p. 56. Walter, however, argues that paragraph three of the Listing Contract required Falcone to enter the Property on the MLS.

[16] Section D of the Listing Contract contained services that the Broker was obligated to provide. The "X" before "3" indicates that the Broker agreed to provide the services listed in paragraph three. The paragraph then designates the Broker as "a REALTOR member of GNIAR *and/or*" "a Participant in the GNIAR Multiple Listing Service (MLS) . . . ." *Id.* (emphasis added). There is no indication in the paragraph that the next phrase, requiring the Broker to enter the Property on the MLS, applies only if the Broker is a participant in the GNIAR MLS rather than if the Broker is a realtor member of GNIAR.

[17] Under Falcone's interpretation of paragraph three, checking the "X" before paragraph 3 would obligate a realtor member of GNIAR to provide no services whatsoever pursuant to that paragraph. Simply saying that the Broker is a Realtor member of GNIAR is not a service. Falcone's interpretation fails to apply a common sense reading of the Listing Contract as a whole. Accordingly, we conclude that, based on the plain, unambiguous language of the Listing Contract, by marking an "X" before the third paragraph, Falcone agreed to enter the Property in the MLS.[3]

[18] "When one party to a contract commits the first material breach of that contract, it cannot seek to enforce the provisions of the contract against the other party if that other party breaches the contract at a later date." *Hussain v. Salin Bank & Tr. Co.*, 143 N.E.3d 322, 331 (Ind. Ct. App. 2020), *trans. denied*. Whether a party has materially breached an agreement is a question of fact and is dependent upon several factors including:

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[3] If contract language is unambiguous, we "may not look to extrinsic evidence to expand, vary, or explain the instrument but must determine the parties' intent from the four corners of the instrument." *Celadon Trucking Servs., Inc. v. Wilmoth*, 70 N.E.3d 833, 839 (Ind. Ct. App. 2017), *trans. denied*. While in his Affidavit Falcone contends that, at the time the Bartkowiaks signed the Listing Contract, they "understood" he did not participate in the MLS, where the allegations of a pleading are inconsistent with the terms of a written contract, the contract, fairly construed, must prevail. *Id.* at 840. Moreover, even if we found the Listing Contract to be ambiguous, we would construe the contract against Falcone. *See id* at 839 ("An ambiguous contract should be construed against the party who furnished and drafted the agreement.").

> (a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;
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> (b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;
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> (c) The extent to which the party failing to perform has already partly performed or made preparations for performance;
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> (d) The greater or less hardship on the party failing to perform in terminating the contract;
>
> (e) The willful, negligent or innocent behavior of the party failing to perform;
>
> (f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract.

Id.

[19] Walter designated evidence indicating that using MLS "is the most effective marketing tool for selling real estate." Appellant's App. Vol. II p. 48. "If a property for sale is not listed in a[n] MLS or on a popular website, it is unlikely that other realtors and potential buyers will see that the property is for sale." *Id.* The Bartkowiaks were denied a substantial benefit of the Listing Contract. Falcone's failure to enter the Property on the MLS actually hindered the Bartkowiaks' prospects by diminishing the likelihood of a sale. The designated evidence establishes that the factors weigh in the Bartkowiaks' favor and, thereby, constituted a material breach of the Listing Contract. Under these

circumstances, we conclude as a matter of law that Falcone's breaches were material. *See, e.g., A House Mechanics, Inc. v. Massey*, 124 N.E.3d 1257, 1263 (Ind. Ct. App. 2019) (concluding that the breaches were material as a matter of law).

[20] Because Falcone was the first to commit a material breach of the Listing Contract, Falcone could not enforce the provisions of the contract against the Bartkowiaks as a result of their later termination of the Listing Contract. Accordingly, we conclude that the trial court erred by granting summary judgment to Falcone on the Bartkowiaks' complaint and Falcone's counterclaim. Rather, the Bartkowiaks were entitled to summary judgment on their cross-motion for summary judgment.

Conclusion

[21] Falcone materially breached the Listing Contract first by failing to enter the Property on the MLS. Accordingly, we conclude that the trial court erred by granting summary judgment to Falcone on his counterclaim and on the Bartkowiaks' complaint. Rather, the Bartkowiaks were entitled to summary judgment on their complaint and on Falcone's counterclaim. We reverse and remand with instructions for the trial court to enter summary judgment for the Bartkowiaks on Falcone's counterclaim and their complaint and to conduct a hearing on the issue of damages, if any, pursuant to the Listing Contract.

[22] Reversed and remanded.

Najam, J., and Pyle, J., concur.