MEMORANDUM DECISION

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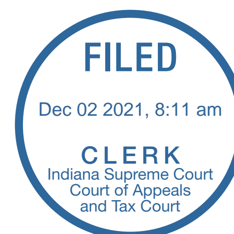

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IN THE COURT OF APPEALS OF INDIANA

John Collier Logging, Inc., an Indiana Corporation,

Appellant-Defendant,

Hardwood Timber & Veneer, Inc., an Indiana Corporation,

Appellant-Defendant/Counterclaimant/Third Party Plaintiff,

v.

Mahvash-K. LLC,

Appellee-Plaintiff/Counterclaim Defendant

Mahvash Khosrowyar, Mavash Kariminoghaddam,

December 2, 2021

Court of Appeals Case No. 21A-CT-954

Appeal from the Hamilton Superior Court

The Honorable Michael A. Casati, Judge

Trial Court Cause No. 29D01-2005-CT-3368

Mahvash Karimi Moghaddam, and Mavash Khosrowyar Revocable Trust,
Appellees-Third Party Defendants

Vaidik, Judge.

Case Summary

[1] A property owner sued two logging companies, and one logging company counterclaimed. The trial court partially found for the property owner, and the logging companies now appeal. We affirm in part and reverse and remand in part.

Facts and Procedural History

[2] Mahvash Karimi[1] lives on Spring Mill Road in Carmel. Her house sits on 4.3 acres, and she owns several adjoining parcels totaling around thirty acres.[2] The acreage, which is wooded, is just north of I-465.

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[1] The record shows Karimi has gone by several different names, including Mahvash Karimi Moghaddam, Mahvash Khosrowayar, and Mahvash Kariminoghaddam. As she notes on appeal, they "are all the same person." Appellees' Br. p. 6. For ease of reference, we use Karimi.

[2] The properties are titled in Mahvash-K. LLC. Since Karimi is the owner of the LLC, for ease of reference we refer to the properties as being owned by Karimi.

[3] In the summer or fall of 2017, Karimi contacted John Collier, who owns John Collier Logging Company LLC,[3] about buying some of her timber. John went to Karimi's house and marked the trees he wanted to purchase with bright orange or pink paint, including some walnut trees on a 3.7-acre parcel.

[4] On January 26, 2018, Karimi and John Collier Logging executed a "Contract for Purchase and Cutting of Timber." Ex. 1 (referred to as "Contract 1"). Contract 1 described the timber to be cut as "All marked trees" and provided there "could be more trees if so that's more money." *Id.* Contract 1 also said John Collier Logging would "take care of the yard and do a good job not disturbing the ground." *Id.* Contract 1 did not list a total price (the spot for the total price was left blank) but stated Karimi had been given a $7,500 down payment. Contract 1 gave John Collier Logging eighteen months to remove the timber.

[5] After Contract 1 was executed, Karimi told John she needed more money and asked him if he could "mark more trees." Tr. p. 170. John returned to Karimi's property and marked more trees, which were mainly "dead ash" and less desirable than the first trees he marked. *Id.* at 173. Thereafter, John had some health issues and determined he couldn't complete the job within the required time frame. John asked his brother Ray Collier—owner of Hardwood Timber &

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[3] Contract 1 lists John Collier Logging, Inc. However, it was clarified at trial that the company had been changed to an LLC. *See* Tr. pp. 136, 168; Ex. D.

Veneer, Inc.—if he wanted the job. In early March 2019, John and Ray went to Karimi's house, and John showed Ray the trees he had marked.

[6] On March 22, Karimi and Hardwood Timber executed a "Timber Contract." Ex. 2 (referred to as "Contract 2"). Contract 2, which did not reference Contract 1, was for "ALL marked trees on all parcels" for $28,500. *Id.* Contract 2 also provided Hardwood Timber would trim the trees around the pool, house, and gate and "make sure the yard is back to as good or better than when we started." *Id.* In addition, Contract 2 contained the following provision about change in ownership:

> Seller [Karimi] agrees to notify Purchaser [Hardwood Timber] a minimum of thirty (30) days prior to any change in ownership of the property on which the standing timber is located. Prior to any change of ownership of such property, Seller agrees to notify any and all buyers of such property of Purchaser[']s ownership of standing timber and of the rights and obligations of this timber contract.

Id. That same day, Hardwood Timber paid Karimi $21,000—the $28,500 contract price minus the $7,500 Karimi had received from John Collier Logging.[4] *See* Ex. E.

[7] On April 11, Hardwood Timber asked Karimi to sign another document. Hardwood Timber told Karimi it tried to record Contract 2 with the Hamilton

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[4] Hardwood Timber reimbursed John Collier Logging the $7,500 it had paid to Karimi in January 2018.

County Recorder, but the Recorder said the contract needed to contain legal descriptions of the parcels and be notarized. Karimi signed the new document. *See* Ex. 3 (referred to as "Contract 3"). Contract 3 did not reference Contract 1 or Contract 2. Although Contract 3 was largely the same as Contract 2, it did not list a price. Hardwood Timber had Contract 3 notarized after Karimi signed it (meaning Karimi didn't sign Contract 3 in the notary's presence) and then filed it with the Recorder on April 15.

[8] On April 27, after Hardwood Timber had started work, Karimi sent it a letter stating she had "recently signed a purchase agreement to sell" the 3.7-acre parcel, which had the marked walnut trees on it, to her neighbor. Ex. F. In the letter, Karimi acknowledged there were marked trees on that parcel but instructed Hardwood Timber to "not remove any trees within this area" until they could determine the exact number of trees. *Id*. After discussions between the parties, on May 3 Karimi told Hardwood Timber to "[s]top cutting" on the 3.7-acre parcel. Ex. J-4. Shortly thereafter, she ordered Hardwood Timber to "[s]top coming" to her property altogether. Tr. p. 94. Hardwood Timber left before it could remove the trees it had marked on the 3.7-acre and other parcels or provide any restoration work.

[9] In May 2020, Karimi filed a complaint against John Collier Logging and Hardwood Timber alleging (1) breach of contract for removing more trees than it agreed to remove; (2) negligence for creating and not repairing damage

caused by rutting; and (3) slander of title for putting a lien on her property.[5] Appellants' App. Vol. II pp. 21-35. Hardwood Timber filed a counterclaim against Karimi[6] alleging (1) breach of contract for "bar[ring] [it] access [to her property] to complete the harvest of the identified trees" it had purchased; (2) unjust enrichment for Karimi retaining the benefit of the trees it had purchased[7]; and (3) conversion for "exert[ing] unauthorized control over the property sold to" Hardwood Timber.[8] *Id*. at 46-47.

[10] A bench trial was held in March 2021. Karimi presented evidence that Hardwood Timber's equipment had created ruts on her property, including some that were twenty-four inches deep. *See* Tr. p. 54. Ray acknowledged Karimi's property needed restoration work; however, he said he does this work

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[5] Karimi also alleged violations of Indiana Code chapter 25-36.5-1. This chapter addresses the Indiana Department of Natural Resources' regulation of timber buyers. *See* Ind. Code § 25-36.5-1-3.2 (providing the Department of Natural Resources may "commence a proceeding against a timber buyer"). The Department of Natural Resources is not involved in this case. *Cf. Cowper v. Collier*, 720 N.E.2d 1250 (Ind. Ct. App. 1999) (case against timber buyer held before an administrative law judge), *reh'g denied*, *trans. denied*. Karimi does not argue she has a private cause of action to enforce the provisions in Indiana Code chapter 25-36.5-1.

[6] The trial court said both John Collier Logging and Hardwood Timber filed the counterclaim. However, only Hardwood Timber did so. *See* Appellants' App. Vol. II p. 43.

[7] The existence of an express contract generally precludes a claim for unjust enrichment. *See Kohl's Ind., L.P. v. Owens*, 979 N.E.2d 159, 168 (Ind. Ct. App. 2012). Because we find Contract 2 is valid and enforceable and because Hardwood Timber does not directly challenge the trial court's rejection of this counterclaim, we do not address it.

[8] Hardwood Timber also made a counterclaim for fraud, alleging Karimi made material misrepresentations about "the true ownership" of the parcels. Appellants' App. Vol. II p. 48. The trial court rejected this counterclaim, finding Hardwood Timber did not prove "any representation to be untrue." *Id.* at 19. We affirm the trial court on this point.

"at the end of the job" and because Karimi barred him from her property he couldn't do it even though he was "ready, willing, and able." *Id.* at 197-98.

[11] The court issued findings and conclusions.[9] Specifically, the court (1) entered judgment against Karimi on her breach-of-contract claim because it found there was no valid contract since there was "no agreement as to price and tree count"; (2) entered judgment against John Collier Logging and Hardwood Timber on Karimi's negligence claim based on damage caused by rutting and awarded Karimi $33,967.27; (3) entered judgment against John Collier Logging and Hardwood Timber on Karimi's slander-of-title claim for filing the "defective" contract (which wasn't signed in the notary's presence) with the Recorder and awarded Karimi $2,500 in attorney's fees for "litigating the removal of the recorded contract[] encumbering the title"[10]; and (4) entered judgment against Hardwood Timber on its counterclaims. Appellants' App. Vol. II p. 18.

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[9] Our review of this case has been hampered by numerous inconsistencies in the trial court's findings and conclusions. For example, the court said in several places there was no enforceable contract between the parties because there was no agreement as to price or tree count. *See* Finding 14, Conclusion 2. However, the court said in other places there was an agreement for 87 trees and that John Collier Logging and Hardwood Timber were liable for $12,350 for failing to trim trees "as contracted." *See* Findings 11, 12. On appeal, John Collier Logging and Hardwood Timber note some of these inconsistencies. *See* Appellants' Reply Br. p 14 (arguing the trial court chose to "selectively enforce some of the terms of a contract the trial court also found did not exist"). Karimi also notes inconsistencies, arguing the trial court found she was entitled to $12,350 in damages for failing to trim trees in the findings (Finding 12) but didn't award these damages in the conclusions. *See* Appellees' Br. p. 26. The trial court can sort through these issues on remand.

[10] Hardwood Timber argues the trial court erred in entering judgment for Karimi on this claim; however, Hardwood Timber does not develop this argument with citation to legal authority. *See* Ind. Appellate Rule 46(A)(8)(a). We therefore affirm the trial court on this point.

[12] This appeal ensued.

Discussion and Decision

I. Validity of Contract

[13] The key issue is whether there was a valid and enforceable contract. The trial court found none of the signed documents was a valid and enforceable contract. Whether a contract exists is a question of law. *Conwell v. Gray Loon Outdoor Marketing Group, Inc.*, 906 N.E.2d 805, 813 (Ind. 2009).

[14] A contract for the sale of standing timber is a contract for the sale of an interest in land and must be in writing. *Watson v. Adams*, 69 N.E. 696 (1904). Indiana Code section 32-34-9-10 provides:

> A contract for the sale of standing trees or standing timber may not be enforced by a legal action unless the contract or some memorandum of the contract is in writing and signed by the person to be charged or the person's duly authorized agent.

[15] To be valid and enforceable, a contract must be reasonably definite and certain. *Perrill v. Perrill*, 126 N.E.3d 834, 840 (Ind. Ct. App. 2019), *trans. denied*; Restatement (Second) of Contracts § 33 (Oct. 2021 update) (the terms of a contract must be "reasonably certain"); *see also* 52 Am. Jur. 2d *Logs and Timber* § 13 (Nov. 2021 update) (contracts for the sale of timber should be "definite and certain"); W.R. Habeeb, Annotation, *Sufficiency of Description in Standing Timber Deed or Contract*, 35 A.L.R.2d 1422, § 1 (1954) (contracts for the sale of timber should be "definite and certain"). An agreement required to be in writing must

completely contain the essential terms without resort to parol evidence to be enforceable. *Coca-Cola Co. v. Babyback's Int'l, Inc.*, 841 N.E.2d 557, 565 (Ind. 2006); *Perrill*, 126 N.E.3d at 140.[11]

A. Contract 1

[16] Contract 1 between Karimi and John Collier Logging was for "All marked trees." However, it did not contain a total price or provide a method for determining price. The lack of a total price makes Contract 1 invalid and unenforceable. *Cf. Cowper v. Collier*, 720 N.E.2d 1250, 1256 (Ind. Ct. App. 1999) (holding a timber contract, which provided the timber buyers[12] would pay $12,500 for 175 trees at least eighteen inches in diameter, was valid and enforceable), *reh'g denied*, *trans. denied*; *Johnson v. Sprague*, 614 N.E.2d 585, 590 (Ind. Ct. App. 1993) (holding a contract for the sale of real estate was sufficiently definite to satisfy the statute of frauds because it identified, among other things, the purchase price); 10 Williston on Contracts § 29:14 (4th ed. May 2021 update) ("The purchase price for the land or goods that are the subject of the transaction must be stated or the criteria for determining

[11] John Collier Logging and Hardwood Timber argue the trial court erred in considering parol evidence (Karimi's testimony) that Contract 1 was for 87 trees even though Contract 1 did not specify a number of trees. We agree. However, although the trial court considered parol evidence, it still found no contract.

[12] John and Ray were the timber buyers in *Cowper*.

the price must be included in the memorandum to render the contract enforceable under the Statute of Frauds.").[13]

[17] In a related issue, John Collier Logging argues it is not a proper party to this case because Karimi "completely failed to show any acts complained of were committed by" John Collier Logging.[14] Appellants' Br. p. 15. We agree. As just explained, Contract 1 between Karimi and John Collier Logging is not valid and enforceable, and John Collier Logging was not a party to Contract 2 or Contract 3. In addition, John Collier Logging performed no work on Karimi's property that is the basis of her claims. As John Collier Logging puts it, it was "long gone from Karimi's property" "before any of the events she complains of occurred." *Id.* at 16. On remand, the trial court should dismiss John Collier Logging from this case.

B. Contract 2

[18] Contract 2 between Karimi and Hardwood Timber was for "ALL marked trees on all parcels." Unlike Contract 1, it contained a price—$28,500. However, the trial court found this document wasn't a valid and enforceable contract because

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[13] Even if we found Contract 1 to be valid and enforceable, it appears Karimi and John Collier Logging abandoned it. *See Estate of Kappel v. Kappel*, 979 N.E.2d 642, 652 (Ind. Ct. App. 2012) ("Abandonment may be inferred from the conduct of the parties, and a contract will be treated as abandoned when one party acts inconsistently with the existence of the contract, and the other party acquiesces.").

[14] After Karimi's case in chief, John Collier Logging "move[d] to dismiss [it] as a Defendant in this case" because Karimi failed to "demonstrate[] any damages due or owing or attributable" to John Collier Logging as it was "pretty plain that the dispute lies between" Karimi and Hardwood Timber. Tr. p. 124. The trial court denied the motion, and John Collier Logging renews this argument on appeal.

it didn't specify the number of trees. Hardwood Timber argues it doesn't matter that the number of trees wasn't specified since the agreement was for "ALL marked trees on all parcels" and the trees were "clearly identified and marked" with bright paint. Appellants' Br. p. 21. We agree with Hardwood Timber. When Karimi and Hardwood Timber executed Contract 2 on March 22, 2019, all trees had been marked with bright paint. Although Contract 2 would have been clearer if it specified the number of marked trees, failing to do so doesn't make it invalid and unenforceable. Reasonable certainty—not absolute certainty—is required. *Conwell*, 906 N.E.2d 813. Accordingly, Contract 2 is valid and enforceable. *See Mailliard v. Willow Creek Ranch Co.*, 78 Cal. Rptr. 139, 141 (Ca. Ct. App. 1969) (holding a grant for "all the merchantable timber" of "Any size diameter" was not ambiguous and that it was "obvious that the parties here intended to leave it up to the grantees as to what trees they deemed merchantable"); *see also Dean v. Great N. Nekoosa Corp.*, 303 S.E.2d 445, 448 (Ga. 1983) (noting the use of the word "timber" with no "qualifying, limiting, or definitive words" was ambiguous).

C. Contract 3

[19] Shortly after Contract 2 was executed, Hardwood Timber asked Karimi to sign Contract 3 so it could file it with the Recorder. Contract 3, however, did not include a price. For the same reason as Contract 1, Contract 3 is not valid and enforceable.

II. Breach-of-Contract Counterclaim

[20] Having determined Contract 2 is valid and enforceable, we now address Hardwood Timber's argument the trial court erred in rejecting its breach-of-contract counterclaim, which alleged Karimi barred it from her property, preventing it from completing the harvest of the trees it had purchased.[15] Because the court found no contract, it didn't reach the issue of breach. Whether a party breaches a contract is generally a question of fact to be determined by the trier of fact. *Rogier v. Am. Testing & Eng'g Corp.*, 734 N.E.2d 606, 621 (Ind. Ct. App. 2000), *reh'g denied*, *trans. denied*. Accordingly, we remand this case to the trial court. If the court determines Karimi breached the contract, it must determine damages. This will require determining, among other things, how many marked trees Hardwood Timber wasn't able to remove from all the parcels.[16]

III. Negligence Claim

[21] Hardwood Timber next contends the trial court erred in finding for Karimi on her negligence claim, which alleged:

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[15] Karimi does not cross-appeal the trial court's rejection of her breach-of-contract claim. Instead, she argues the trial court properly found no contract existed. *See* Appellees' Br. p. 19.

[16] The record is unclear as to how many marked trees were left behind. For example, for the 3.7-acre parcel, evidence was presented there were as few as six and as many as thirty marked walnut trees. *Compare* Tr. pp. 174, 177 (John testifying he marked "around 30" walnut trees on that parcel) *with* Ex. 9 (Karimi's tree inventory showing there were six marked walnut trees on that parcel).

> 10. In the course of removing timber from Plaintiff[']s property, Defendants damaged Plaintiff[']s property by creating ruts throughout the property, tearing up existing pathways and roadways, damaged grass area and damage to the real estate in excess of customary tree removal.
>
> 11. Defendants assured Plaintiff repeatedly that Defendants would "take care of the yard and do a good job not disturbing the ground" and would "make sure the yard is back to as good or better than when we started", however, Defendants['] **negligent performance of its duties under the contract** have resulted in damages to Plaintiff[']s property in the amount of $55,000.00 in order to repair the damage caused by the Defendants.

Appellants' App. Vol. II pp. 22-23 (emphasis added). Karimi's negligence claim is based, at least in part, on Hardwood Timber's breaching the contract. *See INS Investigations Bureau, Inc. v. Lee*, 784 N.E.2d 566, 576 (Ind. Ct. App. 2003) ("[I]n a contract for work, there is an implied duty to do the work skillfully, carefully, and in a workmanlike manner. Negligent failure to do so is a tort, as well as a breach of contract." (quotations omitted)), *trans. denied*.

[22] To the extent Karimi's negligence claim is based on breach of contract because Hardwood Timber did not restore her property as promised, Karimi may be out of luck if the trial court on remand determines she breached the contract first for banning Hardwood Timber from her property. If one party to a contract commits the first material breach of a contract, it cannot seek to enforce the contract against the other party if that party breaches the contract later. *See Hussain v. Salin Bank & Tr. Co.*, 143 N.E.3d 322, 331 (Ind. Ct. App. 2020), *trans. denied*; *Sheek v. Mark A. Morin Logging, Inc.*, 993 N.E.2d 280, 289 n.8 (Ind. Ct.

App. 2013), *trans. denied*. The trial court appeared to acknowledge this when it found:

> [Karimi] prohibited Hardwood [Timber] from returning to the property after May 3, 2019, to remove any further trees beyond the [ones] that Hardwood [Timber] had removed. This also prevented Hardwood [Timber] from cleaning up the debris and trimming/removing trees around the house.

Appellants' App. Vol. II p. 14. The court should reconsider the negligence claim on remand.

IV. Conversion Counterclaim

[23] Hardwood Timber next contends the trial court erred in rejecting its counterclaim for conversion. *See* I.C. §§ 34-24-3-1, 35-43-4-3. The trial court found this claim failed since there was no agreement as to price or tree count. *See* Appellants' App. Vol. II p. 19. However, we determined above Contract 2 is valid and enforceable. On remand, the trial court should reconsider this counterclaim given our determination Contract 2 is valid and enforceable.

[24] Affirmed in part and reversed and remanded in part.

May, J., and Molter, J., concur.