MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Darrell E. Johnson, Sr.,
Appellant-Defendant,

v.

Linda J. Larkins,
Appellee-Plaintiff.

June 27, 2023

Court of Appeals Case No. 22A-EV-2844

Appeal from the Marion Superior Court

The Honorable Marc T. Rothenberg, Judge

Trial Court Cause No. 49D07-2207-EV-24573

Memorandum Decision by Judge Tavitas
Judges Bailey and Kenworthy concur.

Tavitas, Judge.

Case Summary

[1] Linda Larkins, the owner of residential property, entered into a contract with Darrell Johnson whereby Johnson would inhabit the property pending his purchase of the property by a designated date. After Johnson failed to purchase the property by the designated date, Larkins filed an action for possession and damages against Johnson. The trial court awarded prejudgment possession of the property to Larkins pursuant to Indiana Code Section 32-30-3-5. Johnson appeals and argues that the trial court's judgment is clearly erroneous. We disagree and affirm.

Issue

[2] Johnson raises several issues, which we consolidate and restate as whether the trial court clearly erred by awarding prejudgment possession to Larkins.

Facts

[3] In 2015, Larkins, the owner of residential property located in Indianapolis (the "Property"), approached Johnson, a real estate agent, regarding selling the Property to him. Johnson was interested in purchasing the Property, and he wrote a letter to Larkins asking for "a 24 month period . . . to get this financed." Ex. Vol. III p. 3.

[4] On May 17, 2016, Johnson drafted and the parties signed a "Contract for Deed" ("Contract") regarding the sale of the Property. *Id.* at 4. The Contract provided that Johnson would purchase the Property subject to enumerated "defects" and would make monthly payments of $1,000 until the "Purchase

Price" of $240,000 was "paid in full." *Id.* at 5. These monthly payments would be "applied to the principal amount of the Purchase Price outstanding." *Id.* Johnson also agreed to pay a down payment of $5,000, pay taxes on the Property, and keep the Property insured.

[5] The Contract also contained a clause governing the waiver of "any rights by any party in connection with" the Contract, a forfeiture clause, and a notice clause. *Id.* at 9. The notice clause provided that, in the event of Johnson's "failure to perform any covenant or condition," Larkins would provide Johnson with "a notice of default," and Johnson would have fourteen days from receipt of that notice to remedy the default. *Id.* at 6. If Johnson failed to timely cure the default, the remainder of the Purchase Price would be due within thirty days upon which date the Contract would terminate and Johnson would have thirty additional days to vacate the Property.

[6] Johnson paid the $5,000 deposit and, in October 2016, took possession of the Property. Johnson began making monthly payments; however, he had difficulty obtaining a mortgage due to the condition of the Property. Johnson was also late on several monthly payments.

[7] On September 10, 2018, Johnson drafted a "Payment Agreement," which stated, "We will place a mortgage on the property and pay the balance owed of $235,000 in full by May 30, 2019." *Id.* at 17. Larkins, however, did not sign the Payment Agreement, and it was not incorporated into the Contract.

[8] In 2019, Johnson applied for a mortgage from the Veterans Administration ("VA"). That same year, the parties executed Addendum #2, which modified the Contract to provide:

> 1. Buyer has until 12/31/2020 to purchase the [Property].
> 2. Remaining Balance as of 12/31/2019 is $235,000.
> 3. Buyer will continue to pay taxes and property [i]nsurance.
> 4. Buyer will pay $1,000 @ month for lease, per agreement.

Id. at 18. The parties executed no other modifications to the Contract.

[9] Johnson did not obtain the VA's approval for the mortgage until the end of 2021, at which point he presented the mortgage documents to Larkins. Larkins did not sign the documents, and the mortgage was not finalized. Johnson later applied for another mortgage, and Larkins, again, did not sign the required documents. Johnson subsequently stopped making monthly payments and paying taxes on the Property on or around March 2022.

[10] On May 27, 2022, Larkins's counsel sent a letter to Johnson's counsel at the time. The letter stated that Johnson had not purchased the Property by December 31, 2020, as required by Addendum #2, and that Johnson "has refused to make rent payments or pay any property taxes." *Id*. at 21. The letter further stated that "Ms. Larkins provided Mr. Johnson with Notice of his breach of the Contract and cancellation of the same on January 10, 2022" and

that Johnson had not timely remedied the default. *Id*. Johnson failed to make monthly payments and pay property taxes thereafter.

[11] On July 21, 2022, Larkins filed a complaint for possession of the Property and damages against Johnson.[1] Larkins also filed a motion to bifurcate the proceedings and to determine whether Larkins was entitled to prejudgment possession of the Property.

[12] The trial court held a hearing on prejudgment possession on September 21, 2022. On November 29, 2022, the trial court issued sua sponte findings of fact and conclusions thereon. The trial court found that the Contract was a lease and that the sale of the Property was contingent upon Johnson purchasing the Property for $235,000 by December 31, 2020, which Johnson did not do. The trial court further found:

> 19. Mr. Johnson has refused to make rent payments under the Contract since at least March 2022 and has failed to pay property taxes associated with the Property since Spring 2021.
>
> 20. Ms. Larkins gave Mr. Johnson notice of his breaches of the Contract and cancellation of the same on January 10, 2022, and again on May 27, 2022.

[1] On August 26, 2022, Johnson filed a notice of *lis pendens* asserting an interest in the Property, and, on September 16, 2022, Larkins amended her complaint to add a claim for slander of title.

21. Pursuant to the Contract, upon receipt of the Notices of Breach, Mr. Johnson had fourteen (14) days to remedy his default.

22. Mr. Johnson did not remedy his default within the prescribed time period and as such, pursuant to the Contract, the entire balance of the purchase price became due and payable within thirty (30) days.

23. Mr. Johnson did not pay the purchase price of $235,000.00, or any amount for that matter, within thirty (30) days and, as a result, pursuant to the Contract, the Contract terminated, leaving Mr. Johnson with thirty (30) days to vacate the Property.

24. To date, Mr. Johnson has failed and refused to vacate the Property.

Appellant's App. Vol. III pp. 4-5 (record citations omitted). The trial court concluded:

25. [D]ue to Mr. Johnson's failure to obtain financing, failure to make monthly payments, failure to pay taxes and insurance, Mr. Johnson is in breach of the Contract and Addendum #2.

26. Ms. Larkins, by counsel, gave Johnson proper notice, presented adequate evidence and is entitled to prejudgment possession . . . .

Id. at 11 (record citations omitted). The trial court set a hearing on damages for a later date. Johnson now appeals.

Discussion and Decision

[13] Two points bear mentioning at the outset of our decision. First, the trial court has not yet entered final judgment, and this appeal is, thus, interlocutory. Johnson is entitled to an interlocutory appeal as a matter of right pursuant to Indiana Appellate Rule 14(A)(4) because the trial court awarded prejudgment possession to Larkins. *See Colvin v. Taylor*, 168 N.E.3d 784, 788 (Ind. Ct. App. 2021). Johnson, however, did not seek certification to file a discretionary interlocutory appeal regarding other matters in this case, *see* Ind. App. R. 14(B), and many of Johnson's arguments pertain to damages, not possession. As a result, those arguments are not available for our review and will not be decided today.

[14] Second, though the trial court found the Contract to be a lease, and Johnson insists that it was a land sale contract, we need not decide that issue. The plain language of the Contract is sufficient for us to decide the issue of possession, and we find that, under the Contract's plain language, the trial court did not clearly err by finding that Larkins was entitled to prejudgment possession of the Property.

I. Standard of Review

[15] Where, as here, the trial court issues sua sponte findings of fact and conclusions thereon:

> [T]he reviewing court will not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the

> witnesses. [T]he appellate court reviews issues covered by the findings with a two-tiered standard of review that asks whether the evidence supports the findings, and whether the findings support the judgment. Any issue not covered by the findings is reviewed under the general judgment standard, meaning a reviewing court should affirm based on any legal theory supported by the evidence.

Steele-Giri v. Steele, 51 N.E.3d 119, 123-24 (Ind. 2016) (internal citations omitted). In contrast to the trial court's findings of fact and conclusions thereon, to which we give significant deference, we review the trial court's conclusions of law and the language of a contract de novo. *In re Adoption of I.B.*, 32 N.E.3d 1164, 1169 (Ind. 2015); *Lake Imaging, LLC v. Franciscan Alliance, Inc.*, 182 N.E.3d 203, 206 (Ind. 2022).

[16] This case largely turns on the language of the Contract. In interpreting such language, we are guided by the following principles:

> The goal of contract interpretation is to determine the intent of the parties when they made the agreement. This court must examine the plain language of the contract, read it in context and, whenever possible, construe it so as to render every word, phrase, and term meaningful, unambiguous, and harmonious with the whole. If contract language is unambiguous, this court 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.

Layne v. Layne, 77 N.E.3d 1254, 1265 (Ind. Ct. App. 2017), *trans. denied*. In addition, to the extent a contract is ambiguous, "it is construed against its drafter." *Estate of King by Briggs v. Aperion Care*, 155 N.E.3d 1193, 1195 (Ind. Ct.

App. 2020) (quoting *MPACT Const. Group, LLC v. Superior Concrete Constructors, Inc.*, 802 N.E.2d 901, 910 (Ind. 2004)), *trans. denied*.

II. The trial court did not clearly err by concluding that Larkins was entitled to prejudgment possession of the Property

[17] Johnson argues that the trial court clearly erred by concluding that Larkins was entitled to prejudgment possession of the Property. We disagree.

[18] Under our ejectment statutes, "[a] person having a valid subsisting interest in real property and a right to the possession of the real property may recover the real property and take possession by an action brought against the tenant in possession or, if there is not a tenant, against the person claiming the title or interest in the real property." Ind. Code § 32-30-2-1. A person need not wait until final judgment is entered to obtain possession of disputed property; rather, the person may request an order for prejudgment possession of the property. Ind. Code § 32-30-3-5. Our ejectment statutes then "provide[] for a prejudgment possession hearing to allow a defendant to dispute a plaintiff's claim for immediate possession and show why the trial court should not remove the defendant from the property and put the plaintiff in possession." *Colvin*, 168 N.E.3d at 788 (citing Ind. Code § 32-30-3-2; *Bishop v. Housing Auth. of S. Bend*, 920 N.E.2d 772, 779 (Ind. Ct. App. 2010), *trans. denied*)).

[19] After a prejudgment possession hearing, pursuant to Indiana Code Section 32-30-3-5:

> [T]he court shall:

> (1) consider the pleadings, evidence, and testimony presented at the hearing; and
>
> (2) determine with reasonable probability which party is entitled to possession, use, and enjoyment of the property.
>
> The court's determination is preliminary pending final adjudication of the claims of the parties. If the court determines that the action is an action in which a prejudgment order of possession in plaintiff['s] favor should issue, the court shall issue the order.

[20] Here, although the Contract lacks any express language vesting Johnson with a possessory interest in the Property, the parties agree that Johnson was permitted to inhabit the Property pending completion of the sale. *Cf. Chiprean v. Brody & Lacy Stock*, 925 N.E.2d 489, 491 (Ind. Ct. App. 2010) (where land sale contract contained a "Pre-Closing Possession Agreement" that expressly permitted buyer to take possession pending sale). Where the parties disagree is whether the Contract contained a condition precedent that, if unmet, removed Larkins's obligation to sell the Property to Johnson. We find that the Contract contains such a condition and that Johnson failed to satisfy it.

[21] "Under contract law, a condition precedent is a condition . . . that must be fulfilled before the duty to perform a specific obligation arises." *Ind. State Highway Comm'n v. Curtis*, 704 N.E.2d 1015, 1018 (Ind. 1998); *see also* 5 WILLISTON ON CONTRACTS § 38:7 (4th ed. May 2023 Update) ("A condition precedent is either an act of a party that must be performed or a certain event

that must happen before a contractual right accrues or a contractual duty arises.").

[22] Here, the Contract, as modified, provides, "Buyer has until 12/31/2020 to purchase [the Property]." Ex. Vol. III p. 18. We find that the use of the word "until" unambiguously created a condition precedent; in other words, the sale of the Property was contingent upon Johnson purchasing the Property by December 31, 2020. The word "until" normally communicates the terminus of a fixed window of time. *See Until*, *Amer. Heritage College Dictionary* (3rd ed. 2000) (defining "until" as "[u]p to the time of" and "[b]efore (a specified time)"). As such, the plain language of the Contract indicates that Johnson had only a fixed window of time within which to purchase the Property.[2]

[23] Johnson did not purchase the Property by the designated date, and according to the Contract, Larkins had no obligation to sell the Property to him after that date. *Cf. Dvorak v. Christ*, 692 N.E.2d 920, 924 (Ind. Ct. App. 1998) (holding that real estate purchase agreement terminated of its own accord when prospective buyer failed to obtain financing by date specified in agreement),

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[2] Though we find the Contract unambiguous regarding the condition precedent that Johnson purchase the property by the designated date, to the extent that any ambiguity exists, we must construe that ambiguity against Johnson, the Contract's drafter, which lends support to our finding regarding the condition precedent. Moreover, even if the Contract is ambiguous, our review of the extrinsic evidence presented at the hearing leads us to the same result. In Johnson's 2015 letter to Larkins, Johnson stated, "I'm asking for a 24[-]month period from you to get this financed." Ex. Vol. III p. 3. In Johnson's 2018 Payment Agreement, Johnson stated, "We will place a mortgage on the property and pay the balance owed of $235,000 in full by May 30, 2019." *Id*. at 17. Johnson, thus, repeatedly committed himself to purchasing the Property by a clear deadline, and the Contract, as modified, set that deadline as December 31, 2020.

trans. denied; *Blakley v. Currence*, 361 N.E.2d 921, 923 (Ind. Ct. App. 1977) (holding that real estate purchase agreement terminated of its own accord when prospective buyer failed to obtain financing).

[24] Johnson argues that, despite the language of the Contract, the trial court clearly erred by concluding that Larkins was entitled to prejudgment possession of the Property. We are not persuaded.

[25] First, Johnson argues that Larkins "waive[d] [Johnson's] strict compliance with the provisions of the [Contract]." Appellant's Br. p. 15. The Contract, however, provides that "[a] waiver of any rights by any party in connection with this Agreement will only be binding if evidenced in writing and signed by each party or an authorized representative of each party." Ex. Vol. III p. 9. Johnson does not direct us to any signed writing waiving the Contract's condition precedent.

[26] Next, Johnson argues that Larkins "never provided any notice of default"[3] as required under the Contract. Appellant's Br. p. 20. The trial court found that, based on the May 27, 2022 letter between the parties' counsel, Larkins provided proper notice of default to Johnson on January 10, 2022, and on May 27, 2022. We cannot say the trial court's finding was clearly erroneous based on this

[3] Johnson does not identify the conduct to which he refers by the use of the word "default" here nor does he allege that any such conduct was cured.

evidence. Furthermore, despite these notices, Johnson continued to live in the Property while paying nothing to Larkins.[4]

[27] Lastly, Johnson argues that the Contract's forfeiture clause is unenforceable, and the parties devote a large portion of their briefs to discussing this issue. That issue, however, is irrelevant to whether Johnson is entitled to possession of the Property. As the trial court has not entered final judgment, we do not address whether forfeiture or foreclosure are appropriate. *Cf. Chiprean*, 925 N.E.2d at 493-95 (reaching the issue of whether land sale contract's forfeiture clause was enforceable when trial court had awarded damages).

[28] To summarize, Johnson was required to purchase the Property by the designated date, and he did not do so. Larkins, thus, had no obligation to sell the Property to Johnson after the designated date passed. Accordingly, the trial court did not clearly err by concluding that Larkins was entitled to prejudgment possession of the Property.

Conclusion

[29] The trial court did not clearly err by concluding that Larkins was entitled to possession of the Property. Accordingly, we affirm.

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[4] Johnson argues in his Reply Brief that neither notice was sent "via registered mail as required under the [Contract]," Appellant's Reply p. 5; however, Johnson never presented that argument in his initial brief, and it is, therefore, waived. *See BFD Enterprises, LLC v. Koepnick*, 191 N.E.3d 265, 277 n.8 (Ind. Ct. App. 2022) ("[A] party may not use its reply brief to advance a new argument.").

[30] Affirmed.

Bailey, J., and Kenworthy, J., concur.