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ATTORNEY FOR APPELLANT

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Anderson, Indiana

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IN THE  
COURT OF APPEALS OF INDIANA

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Richard A. Colvin,  
*Appellant-Defendant,*

v.

George M. Taylor,  
*Appellee-Plaintiff*

April 15, 2021

Court of Appeals Case No.  
21A-MF-3

Appeal from the  
Henry Circuit Court

The Honorable  
Robert A. Witham, Judge

Trial Court Cause No.  
33C01-2003-MF-26

**Vaidik, Judge.**

## Case Summary

- [1] Richard A. Colvin appeals the trial court's December 2020 order awarding immediate possession of a house he was buying on contract to the seller. He argues Indiana's moratorium on evictions and foreclosures due to COVID-19 is still in effect and the court therefore erred by taking action in this case. Because

Indiana’s moratorium expired on August 12, 2020, the trial court did not err on this basis. However, the court erred on another basis. That is, the court violated Indiana Code section 32-30-3-6 by awarding immediate possession of the house to the seller without requiring the seller to “file[] with the court a written undertaking in an amount fixed by the court and executed by a surety.” We therefore reverse and remand.

## Facts and Procedural History

[2] On April 15, 2006, Richard and his wife Julie entered into a Contract for Sale of Real Estate with George M. Taylor. Specifically, the Colvins agreed to purchase a house in Middletown for \$75,000. According to the contract, the Colvins had to pay \$3,000 at closing and make monthly payments of \$720.38 for thirty years. Appellant’s App. Vol. II p. 10.

[3] On March 17, 2020, eleven days after Indiana Governor Eric J. Holcomb issued Executive Order 20-02 declaring a public-health emergency due to COVID-19, Taylor filed a “Complaint for Forfeiture of Contract for Sale of Real Estate or in the Alternative, for Foreclosure” against the Colvins. *See* <https://www.in.gov/gov/files/20-02ExecutiveOrderDeclarationofPublicHealthEmergencyforCOVID-19FINAL.pdf>. Specifically, Taylor’s complaint alleges:

4. The Defendants have defaulted under the terms of the Contract in that said Defendants failed for more than thirty (30) days to pay the monthly payments. There is a balance due and owing as of December 31, 2019, of \$67,459.46. . . .

\* \* \* \* \*

7. Plaintiff is entitled to the immediate possession of the aforescribed real estate as a result of breach by Defendants of said Contract; said breach consisting of failure to make timely payments to Plaintiff pursuant to the terms of said Contract.

8. Defendants paid a total of Eighty-Eight Thousand Fifty-Four Dollars and Sixty-Four Cents (\$88,054.64), Seven Thousand Three Hundred and Fifty-Seven Dollars and Sixty-Seven Cents (\$7,357.67) of which was applied to principal (9.8%). Accordingly, the Defendants have no equity in the Contract or in the premises, and forfeiture is the proper remedy pursuant to *Skendzel v. Marshall*, 301 N.E.2d 641 (Ind. 1973).

Appellant's App. Vol. II pp. 7-8. In the event "forfeiture [was] not the proper remedy, [Taylor] [sought] foreclosure."<sup>1</sup> *Id.* at 9. Taylor also filed an affidavit

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<sup>1</sup> This Court has explained the difference between forfeiture and foreclosure as follows:

In *Skendzel v. Marshall*, 261 Ind. 226, 301 N.E.2d 641 (1973), our Supreme Court held that in all but a few specific instances, the proper relief to be granted a vendor upon the vendee's material breach of a land sale contract is a judgment of foreclosure pursuant to Indiana Trial Rule 69(C). Upon foreclosure, the vendee retains a vendee's lien upon the sale, and once the balance owed under the contract has been paid to the vendor, the vendee may retain the proceeds from the sale. If the foreclosure does not net a sufficient amount to satisfy the vendor's remaining security interest in the property, a damage judgment for waste caused by the vendee equivalent to the amount recoverable by a mortgagee as a deficiency judgment would be appropriate. Forfeiture divests property without compensation; in other words, forfeiture terminates an existing contract without restitution. A vendor who has obtained the remedy of forfeiture may cancel the contract, retain the payments made, retain the real estate, and recoup actual damages sustained as a result of the transaction. Forfeiture may be considered an appropriate remedy in limited circumstances, that is, (1) an abandoning or absconding vendee or (2) where the vendee has paid a minimal amount and the vendor's security interest in the property has been jeopardized by the acts or omissions of the vendee.

*Deason v. Bill R. McWhorter & Heather McWhorter Revocable Living Tr., Dated Jan. 24, 2003*, 112 N.E.3d 1082, 1085-86 (Ind. Ct. App. 2018) (cleaned up).

for immediate possession of the real estate. *Id.* at 14. The trial court set a possession hearing for May 1.

[4] On March 19, two days after Taylor filed his complaint, Governor Holcomb issued Executive Order 20-06 entitled “Temporary Prohibition on Evictions and Foreclosures,” which provides:

1. No eviction or foreclosure actions or proceedings involving residential real estate or property, whether rental or otherwise, may be initiated between the period from the date of this Executive Order until the state of emergency has terminated; and any applicable statute in connection therewith is hereby suspended for any such actions or proceedings as described above. In addition, and notwithstanding the foregoing, any applicable rule or regulation in connection therewith is hereby rescinded for any such actions or proceedings as described above for the duration of the state of emergency.

2. No provision contained in this Executive Order shall be construed as relieving any individual of their obligations to pay rent, to make mortgage payments, or to comply with any other obligation(s) that an individual may have under a tenancy or mortgage.

[https://www.in.gov/gov/files/EO\\_20-06.pdf](https://www.in.gov/gov/files/EO_20-06.pdf).

[5] On April 27, the trial court sua sponte stayed the proceedings pursuant to Executive Order 20-06 and said “the Parties may request the stay be lifted upon the revocation of the Executive Order. The Court will then reschedule the matter at a date convenient with the Court’s calendar.” Appellant’s App. Vol. II p. 16.

- [6] On July 30, Governor Holcomb issued Executive Order 20-39, which, among other things, extended the moratorium on evictions and foreclosures until August 14. See <https://www.in.gov/gov/files/Executive-Order-20-39-2nd-Extension-Stage-4.5.pdf>. Governor Holcomb did not extend the moratorium when it expired on August 14. See Indiana Courts, Housing and Eviction During COVID-19, *Appendix H: Guidelines for Judges Handling Evictions After Moratoria Expire* (revised Mar. 31, 2021), <https://www.in.gov/courts/files/ltrf-h-guidelines-for-cts-handling-evcts.pdf>.
- [7] On September 30, Taylor filed another affidavit for immediate possession of the real estate, and the trial court scheduled a possession hearing for October 28. Taylor appeared with counsel; Julie did not appear, and Richard appeared pro se. Richard testified he and Julie were separated and she did not live in the house anymore. Although Taylor’s attorney told the court Richard made his last payment in September 2019, Richard claimed he made his last payment in December 2019, approximately ten months before the hearing. Richard explained he had not been making payments because “between all of the COVID stuff and everything it’s just really been a bad year.” Tr. p. 6. The court briefly questioned Richard:

Q ...You are telling me today that you acknowledge that you are behind on payment, is that correct?

A Yes.

Q No payments since December of 2019?

A Yes

Q This was filed back in March of this year. I understand there was some stuff with COVID and there was a moratorium on evictions there for a while, **but that has since expired at this point.**

A We were still under the impression that the moratorium was still in [effect] until the end of December.

Q Well, there's certain things that can happen, but for those to happen then there has to be the appropriate paperwork filed with the Court and nothing has been filed with the Court.

*Id.* at 6-7 (emphasis added); *see also id.* at 7-8 (Taylor's attorney discussing the expired moratorium). When Richard started telling the court about the improvements he had made to the house, the court reminded him the hearing was for possession only and damages would be addressed at another hearing.

[8] On December 7, the trial court issued an order granting Taylor's request for immediate possession of the real estate:

[T]he Court GRANTS Plaintiff's request for immediate possession, pendente lite, and the Court accepts hereby the Plaintiff's ownership of the premises as security for damages if the Court's ruling entered hereby is in error, the same to be determined at the trial of this cause.

In regard to possession of the premises, the Defendant shall vacate the premises on or before ten (10) days from the date hereof; however, if Defendant fails to so vacate, the Sheriff of

Henry County, Indiana, is Ordered to remove the Defendant, all other persons therein, and all personal property.

Appellant's App. Vol. II p. 6.

- [9] Richard now brings this interlocutory appeal as a matter of right pursuant to Indiana Appellate Rule 14(A)(4), as it involves the sale or delivery of the possession of real property.

## Discussion and Decision

- [10] We first note Taylor did not file an appellee's brief. Under that circumstance, we do not undertake to develop the appellee's arguments. *Branham v. Varble*, 952 N.E.2d 744, 746 (Ind. 2011). Rather, we will reverse upon an appellant's prima facie showing of reversible error. *Id.*
- [11] Richard first contends the trial court erred in awarding immediate possession of the real estate to Taylor because Executive Order 20-06, which temporarily prohibited evictions and foreclosures, has "never been rescinded or revoked." Appellant's Br. p. 15. But as detailed above, this is not correct. Executive Order 20-39—which Richard does not cite in his brief—extended Indiana's moratorium on evictions and foreclosures only until August 14, 2020. After the moratorium expired, Taylor filed an affidavit for immediate possession of the

real estate, and a hearing was held in October. The court did not violate Indiana’s moratorium on evictions and foreclosures.<sup>2</sup>

[12] Next, Richard contends the trial court erred in awarding immediate possession of the house to Taylor without requiring him to “file[] with the court a written undertaking in an amount fixed by the court and executed by a surety” as required by Indiana Code section 32-30-3-6.

[13] Indiana Code section 32-30-3-2 provides 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. *See* Ind. Code § 32-30-3-2; *Bishop v. Housing Auth. of S. Bend*, 920 N.E.2d 772, 779 (Ind. Ct. App. 2010), *reh’g denied, trans. denied*. “The statutory hearing manifests the inherent power of trial courts to intercede at an early stage—to make a preliminary decision before what could thereafter be a lengthy judicial process.” *Bishop*, 920 N.E.2d at 779; *see also* Ind.

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<sup>2</sup> Although Richard did not raise this issue below or on appeal, there are federal protections. *See* Indiana Courts, Housing and Eviction During COVID-19, *Appendix H: Guidelines for Judges Handling Evictions After Moratoria Expire* (revised Mar. 31, 2021), <https://www.in.gov/courts/files/lttf-h-guidelines-for-cts-handling-evcts.pdf>. The Centers for Disease Control and Prevention (CDC) has issued a temporary halt in residential evictions from leased properties, which is set to expire on June 30, 2021. To take advantage of this protection, a tenant must fill out a form and give it to their landlord. *See* CDC, Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, *Eviction Protection Declaration*, [https://www.cdc.gov/coronavirus/2019-ncov/downloads/EvictionDeclare\\_d508.pdf](https://www.cdc.gov/coronavirus/2019-ncov/downloads/EvictionDeclare_d508.pdf). In addition, the U.S. Department of Housing and Urban Development (HUD) has issued a moratorium on foreclosures of federally owned or backed single-family mortgages, which is also set to expire on June 30, 2021. Richard has made no claim or showing he is entitled to either protection.



Code §§ 32-30-3-5(a) (providing a trial court’s determination of who is entitled to possession is “preliminary pending final adjudication of the claims of the parties”), 32-30-3-12 (noting a final judgment “supersedes” any “prejudgment order for possession”). This preliminary-possession decision triggers the requirement under Section 32-30-3-6 that the plaintiff file with the court a written undertaking executed by a surety:

A court may not issue an order of possession in favor of a plaintiff other than an order of final judgment until the plaintiff has filed with the court a written undertaking in an amount fixed by the court and executed by a surety to be approved by the court binding the plaintiff to the defendant in an amount sufficient to assure the payment of any damages the defendant may suffer if the court wrongfully ordered possession of the property to the plaintiff.

In short, the plaintiff must file a written undertaking before the court may issue an order of preliminary possession. *I-65 Plaza, LLC v. Ind. Grocery Grp., LLC*, No. 20A-CC-1537, 2021 WL 1203982, at \*8 (Ind. Ct. App. Mar. 31, 2021).

[14] In its order granting Taylor immediate possession of the real estate, the trial court stated it “accept[ed] the Plaintiff’s ownership of the premises as security for damages if the Court’s ruling entered hereby is in error, the same to be determined at the trial of this cause.” But this is not what Section 32-30-3-6 requires. Rather, it requires the plaintiff—here, Taylor—to “file[] with the court a written undertaking in an amount fixed by the court and executed by a surety to be approved by the court.” Richard has made a prima facie showing of error on this issue. We therefore reverse the court’s immediate-possession order and

remand this case to the trial court for further proceedings. *See I-65 Plaza, 2021 WL 1203982, at \*8* (reversing the trial court's order of preliminary possession because the plaintiff did not file a written undertaking under Section 32-30-3-6).<sup>3</sup>

[15] Reversed and remanded.

Bradford, C.J., and Brown, J., concur.

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<sup>3</sup> Richard also contends the evidence is insufficient to support the trial court's award of immediate possession to Taylor because Taylor did not introduce any records into evidence at the October 2020 hearing. Although Taylor did not introduce any records into evidence, Richard himself admitted he was behind on payments and had not made a payment since December 2019.