MEMORANDUM DECISION

ATTORNEYS FOR APPELLANTS

Craig R. Patterson
Brian C. Heck
Beckman Lawson, LLP
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE

Robert Owen Vegeler
Vegeler Law Office LLC
Fort Wayne, Indiana

IN THE

COURT OF APPEALS OF INDIANA

Greg and Cynthia Armbruster,

Appellants/Cross-Appellees/Plaintiffs,

v.

Diana Tran,

Appellee/Cross-Appellant/Defendant.

December 28, 2021

Court of Appeals Case No. 21A-CC-887

Appeal from the Allen Superior Court

The Hon. David J. Avery, Judge

Trial Court Cause No. 02D09-1904-CC-999

Bradford, Chief Judge.

Case Summary

[1] In 2008, Diana Tran began leasing commercial space from the Shambaugh Family Limited Partnership d/b/a Leo Crossing Associates in Fort Wayne ("the First Lease"). Over the next four years, Tran amassed an arrearage of over $30,000.00, and, although Max Shambaugh, the sole general partner of Leo Crossing Associates, took no action to collect on this arrearage, neither did he explicitly forgive it. After Max passed away in 2015, Leo Crossing Associates merged with the C&R Shambaugh Family LLC ("C&R"), of which Cynthia Armbruster and her sister Rebecca Shambaugh were the only two members. In March of 2016, Tran entered into a new lease with C&R ("the Second Lease"), and, over the next two years, amassed another arrearage. After Tran failed to timely satisfy her obligations when demanded, C&R evicted her, and Cynthia and her husband Greg eventually filed suit in April of 2019. Tran responded and filed a counterclaim for breach of contract.

[2] In June of 2020, the trial court issued an order that directed the parties to file their witness and exhibit lists by a certain date in August and provided that failure to timely do so would result in the inability to present such evidence at trial. Tran failed to timely file her witness and exhibit list, and the trial court prohibited her from calling witnesses or offering exhibits at trial. On December 23, 2020, the trial court ordered the parties to file their final lists of contentions by January 8, 2021, which Tran also failed to do. The first part of what was intended to be a bifurcated trial was held on January 15, 2021, and, four days later, after confirming that she still had not filed her final list of contentions,

was barred from testifying on her own behalf in the second phase of trial, which was eventually cancelled. In April of 2021, the trial court issued its amended final judgment, in which it awarded the Armbrusters damages related to the Second Lease only, concluding that the doctrines of accord and satisfaction and waiver relieved Tran of liability related to the First Lease. Restated and condensed, the Armbrusters contend that the trial court erred in concluding that the doctrines of accord and satisfaction and waiver apply to relieve Tran of liability related to the First Lease. Tran cross-appeals, contending that the trial court should have also relieved her of liability related to the Second Lease and that it erred in imposing sanctions on her for violation of pre-trial orders. Because we agree with the Armbrusters' contentions but not Tran's, we affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

[3] In 1997, the Shambaugh Family Limited Partnership was formed, with Max Shambaugh as the sole general partner with three limited partners, including Cynthia Armbruster and her sister Rebecca Shambaugh. In 2007, the Shambaugh Limited Family Partnership was doing business as Leo Crossing Associates. In January of 2008, Tran leased unit 10344 ("the Unit") in the Leo Crossing Shopping Center from Leo Crossing Associates, in which she operated a nail salon. The initial term of the First Lease was for three years with an option for an additional three, after which she would be a holdover tenant if she stayed on. Between January of 2008 and September of 2012, although Tran

amassed an arrearage of approximately $30,000.00, Max took no action to evict her nor initiate litigation to recover the arrearage.

[4] At some point prior to October 27, 2015, Max passed away, and, on October 28, 2015, the Shambaugh Family Limited Partnership merged with C&R. On or about March 29, 2016, Tran entered into the Second Lease with C&R, pursuant to which she continued to occupy the Unit. The term for the Second Lease began on May 1, 2016, and ran through April 30, 2019. Pursuant to the Second Lease, Tran agreed to pay fixed minimum rent as set forth in a rent schedule and estimated monthly additional rent for common-area maintenance, real estate taxes, and insurance. In addition to the estimated monthly additional rent, Tran agreed to be responsible for a proportional share of the yearly reconciliation for taxes, insurance, and common area charges.

[5] On February 28, 2018, C&R provided Tran with a reconciliation for $1531.72 for her proportional share of the taxes, insurance, and common-area charges that were owed for 2017. The reconciliation remained unpaid, and on September 25, 2018, Tran was sent a notice of default for the unpaid reconciliation. On October 23, 2018, after Tran failed to timely pay the reconciliation, C&R sent her a notice to quit and vacate the Unit, which she did on November 12, 2018.

[6] On April 22, 2019, the Armbrusters filed their complaint against Tran, seeking to cover arrearages accrued pursuant to the First and Second Leases, plus interest and attorney's fees. On May 17, 2019, Tran filed her answer and counterclaim, in which she raised the affirmative defenses of waiver, the

Armbrusters' alleged prior material breach, and accord and satisfaction and made a counterclaim for damages for an alleged breach by C&R.

[7] On June 22, 2020, the trial court issued an order governing trial, which provided, in part, that final witness and exhibit lists were to be exchanged on or before August 7, 2020, and that "[f]ailure to comply with the witness and exhibit exchange order will preclude presentation of such witnesses and exhibits at trial upon timely objection of opposing counsel, except for good cause shown." Appellant's App. Vol. II p. 129. On December 23, 2020, the trial court issued an order in which it bifurcated trial, with the first part to address the Armbrusters' claims and the second to address Tran's counterclaim. As it happened, Tran never did file a list of witnesses and/or exhibits, and so the trial court's order also provided as follows: "Due to the failure to file a Final Witness and Exhibit List as per the Order Governing Trial, the Defendant is precluded from calling any witnesses, although Defendant shall be permitted to offer her own testimony. Defendant is also precluded from offering any exhibits." Appellant's App. Vol. II p. 157. Finally, the trial court ordered the parties to "file their Final Statement of Contentions and Stipulations on or before January 8, 2021." Appellant's App. Vol. II p. 157.

[8] Tran, however, also failed to file her final statement of contentions by January 8, 2021, and the Armbrusters moved for sanctions three days later, which motion the trial court took under advisement. The first portion of what was originally intended to be a bifurcated trial occurred on January 15, 2021, during which the Armbrusters introduced evidence that the total principal owed by the

Tran under the First Lease and the Second Lease was $62,892.76. At a status conference on January 19, 2021, the trial court barred Tran from testifying in the second portion of trial after she confirmed that she still had not filed a final statement of contentions.

[9] In the trial court's amended judgment, issued on April 30, 2021, after the second portion of trial had been cancelled, it found that the principal balance owed by Tran to the Armbrusters was $15,172.57, or the arrearage accrued pursuant to the Second Lease only. The trial court's judgment provides, in part, as follows:

> 23. From January 1, 2008 through October 2015, during the approximate eight years that Tran was a tenant of the Leased Premises, despite the on-going rent arrearage and no payment of pro-rated taxes and insurance, there is no evidence that Max Shambaugh ever took any action against Tran to evict Tran or to otherwise collect the arrears. Instead, after almost six years of accumulating arrears, Max Shambaugh, as general partner, agreed to reduce Tran's monthly rent payments to $800.00.
>
> 24. The only reasonable inference that the Court can make from Max Shambaugh's failure to take action to address Tran's default, is that Max Shambaugh, as general partner, purposely decided not to take action to pursue and collect the arrears of rent, taxes, and insurance from Tran. The Court finds that Max Shambaugh, as general partner, by his actions, or more accurately, the lack of action, accepted the payments made by Tran in full satisfaction of her obligations due and owing during the period of the First Lease and the holdover period; or if not accepting Trans payments in full satisfaction of what was owed, Max Shambaugh, as general partner, waived the arrears of rent, taxes, and insurance from Tran due and owing during the period of the First Lease and the

> holdover period until such time that Max Shambaugh passed away.

Appellant's App. Vol. III p. 13. In addition to the principal, the trial court awarded the Armbrusters $5930.47 in prejudgment interest and $36,532.66 in attorney's fees, for a total money judgment of $59,625.70.

Discussion and Decision

Direct Appeal Issue

I. Whether the Trial Court Erred in Concluding that Accord and Satisfaction and/or Waiver Applied to the First Lease

[10] When reviewing findings and conclusions, we first determine whether the evidence supports the findings and then whether the findings support the judgment. *Balicki v. Balicki*, 837 N.E.2d 532, 535-36 (Ind. Ct. App. 2005) (citing *Carmichael v. Siegel*, 754 N.E.2d 619, 625 (Ind. Ct. App. 2001)), *trans. denied*. Findings may be overturned if they are clearly erroneous. *Id*. Findings are clearly erroneous when a review of the record leaves us firmly convinced that a mistake has been made. *Blacklidge v. Blacklidge*, 96 N.E.3d 108, 113 (Ind. Ct. App. 2018).

A. Accord and Satisfaction

[11] The Armbrusters contend that the trial court erred in concluding that the doctrine of accord and satisfaction applied to relive Tran of any further obligation related to the First Lease.

> "Accord and satisfaction is a method of discharging a contract, or settling a cause of action by substituting for such contract or

dispute an agreement for satisfaction." *Daube and Cord v. LaPorte County Farm Bureau* (1983), Ind. App., 454 N.E.2d 891, 894. The term "accord" denotes an express contract between two parties by means of which the parties agree to settle some dispute on terms other than those originally contemplated, and the term "satisfaction" denotes performance of the contract. *Reed v. Dillon* (1991), Ind. App., 566 N.E.2d 585, 590. As a contract, accord and satisfaction requires a meeting of the minds or evidence that the parties intended to agree to an accord and satisfaction. *See Erie Co. v. Callahan Co.* (1933), 204 Ind. 580, 585, 184 N.E. 264, 266. Under Indiana Trial Rule 8(C), accord and satisfaction is an affirmative defense which must be specifically pleaded and proven by the party raising it. The question of whether the party making the defense has met its burden is ordinarily a question of fact but becomes a question of law if the requisite controlling facts are undisputed and clear. *See Rauch v. Shots* (1989), Ind. App., 533 N.E.2d 193, 194, *trans. denied*.

An accord and satisfaction, with regard to checks tendered as payment in full, operates as follows:

> "where the amount is unliquidated or disputed, and a remittance of an amount less than that claimed is sent to the creditor with a statement that it is in full satisfaction of the claim, and the tender is accompanied by such acts or declarations as amount to a condition that if the remittance is accepted it is accepted in full satisfaction of the disputed claim, and the creditor is cognizant of such conditions, the acceptance of such a remittance by the creditor constitutes an accord and satisfaction, even though the creditor protests at the time that the amount tendered is not accepted in full satisfaction unless the debtor withdraws or waives the condition that it be accepted in full satisfaction. In other words, one who accepts and cashes a check tendered in full payment of a disputed claim cannot vary the legal effect of such acceptance as an accord

> and satisfaction by merely ignoring the condition and protesting that he is accepting the check as partial payment only, or by failing to sign the formal receipt enclosed acknowledging full satisfaction, or by endorsing on the check that it is accepted as part payment."
>
> 1 Am. Jur. 2d Accord and Satisfaction § 21, at 320. Similarly, under Indiana law, a check tendered in satisfaction of a claim must be accompanied by an express condition that the acceptance is in full satisfaction of the claim and that the creditor takes the check subject to that condition. *Rauch*, 533 N.E.2d at 194. Further, and most importantly, the creditor must positively understand the condition upon which the check is tendered. Id.

Mominee v. King, 629 N.E.2d 1280, 1282–83 (Ind. Ct. App. 1994).

[12] We may quickly dispose of this claim in the Armbrusters' favor, as there is no evidence in the record that Tran ever tendered a check to Leo Crossing Associates accompanied by an express condition that its acceptance was in full satisfaction of her then-current obligation, whether through language on the check to that effect or by any other means, or that Max ever accepted a check on behalf of Leo Crossing Associates positively understanding that he was accepting it as full satisfaction for any obligation. Given the dearth of evidence supporting a finding of accord and satisfaction with respect to the First Lease, we conclude that the trial court erred in concluding that it occurred.

B. Waiver

[13] The Armbrusters also contend that the trial court erred in concluding that the doctrine of waiver applies to Tran's benefit. Waiver is defined as "the intentional relinquishment of a known right" or "an election to forego some

advantage that might otherwise have been insisted upon." *Union Fed. Sav. Bank v. INB Banking Co. SW.*, 582 N.E.2d 426, 431–32 (Ind. Ct. App. 1991). Waiver may be shown either by express or implied consent, and, thus, the right may be lost by a course of conduct which estops its assertion. *See Continental Optical Co. v. Reed*, 119 Ind. App. 643, 649, 86 N.E.2d 306, 309 (1949). However, waiver is an affirmative act and mere silence, acquiescence or inactivity does not constitute waiver unless there was a duty to speak or act. *See Am. Nat'l Bank & Trust Co. v. St. Joseph Valley Bank*, 180 Ind. App. 546, 554, 391 N.E.2d 685, 687 (1979). As with the affirmative defense of accord and satisfaction, the burden of proof for the waiver Tran asserts is hers. *Id.*, 391 N.E.2d at 687.

[14] As with accord and satisfaction, we have little hesitation in resolving this claim in favor of the Armbrusters. To get straight to the point, there is no evidence in the record that Max ever committed any affirmative act that could be construed as a waiver of his right to collect full rent and other obligations from Tran pursuant to the First Lease. At most, the record indicates that Max was silent or acquiesced in Tran's failure to fulfill her obligations and, and that is not enough when the First Lease did not obligate him to speak or act if Tran failed to discharge her obligations.[1]

[1] Given our disposition of these claims in the Armbrusters' favor, we need not address their claim that the trial court abused its discretion in failing to find that Tran made an alleged judicial admission that she was legally obligated to them in the amount of approximately $60,000.00.

Cross-Appeal Issue

II. Whether the Trial Court Abused its Discretion in Sanctioning Tran for Discovery Violations

[15] Tran argues that the trial court abused its discretion in precluding her from presenting witnesses, introducing exhibits, or testifying on her own behalf at trial following her failures to make certain ordered pre-trial filings. It is very well-settled that "[t]he admission or exclusion of evidence is a determination entrusted to the discretion of the trial court." *Farris v. State*, 818 N.E.2d 63, 67 (Ind. Ct. App. 2004), *trans. denied*. A trial court's determination relating to the admission or exclusion of evidence is reversed only for an abuse of discretion. *Id*. "An abuse of discretion occurs when the trial court's action is clearly erroneous and against the logic and effect of the facts and circumstances before it." *Id*.

[16] Moreover, it is up to the trial court to determine the orderly procedure of a trial. *State ex rel. White v. Marion Sup. Ct., Crim. Div. No. 3*, 271 Ind. 174, 176–77, 391 N.E.2d 596, 597 (1979). Trial courts have the authority to enforce their pre-trial orders and parties have the right to insist upon the strict enforcement of pre-trial orders. *Snyder v. Prompt Med. Transp., Inc.*, 131 N.E.3d 640, 647 (Ind. Ct. App. 2019), *trans. denied*. "A party's failure to adhere to pretrial deadlines 'is inexcusable and subject to sanction.'" *Id*. (quoting *Davidson v. Perron*, 756 N.E.2d 1007, 1013 (Ind. Ct. App. 2001), *trans. denied*). When a trial court has made a decision regarding a violation or sanction, we will only reverse the decision if there is a clear error and resulting prejudice. *Bradley v. State*, 770

N.E.2d 382, 387 (Ind. Ct. App. 2002), *trans. denied*. This is because the "'[t]rial judges stand much closer than an appellate court to the currents of litigation pending before them, and they have a correspondingly better sense of which sanctions will adequately protect the litigants in any given case.'" *Wright v. Miller*, 989 N.E.2d 324, 327 (Ind. 2013) (quoting *Whitaker v. Becker*, 960 N.E.2d 111, 115 (Ind. 2012)).

A. Witnesses and Exhibits

[17] As mentioned, the trial court ordered that Tran could not present testimony or introduce exhibits at trial because she failed to timely file her list of witnesses and exhibits. Also as mentioned, on June 22, 2020, the trial court issued an order governing trial, which provided, in part, that final witness and exhibit lists were to be exchanged on or before August 7, 2020, and that "[f]ailure to comply with the witness and exhibit exchange order will preclude presentation of such witnesses and exhibits at trial upon timely objection of opposing counsel, except for good cause shown." Appellant's App. Vol. II p. 129. The trial court gave Tran a month and a half in which to timely file a witness and exhibit list, but she failed to do so, despite the trial court's very clear order that such a failure would result in her losing the ability to call witnesses or introduce exhibits at trial. Under the circumstances, and in the absence of any claim of good cause, we cannot say that the trial court erred in doing exactly what it said it would do.

B. Tran's Ability to Testify on Her Own Behalf

[18] As for Tran's ability to testify on her own behalf, the trial court ordered that she could not following her failure to timely file a final list of contentions. As a reminder, the trial court ordered on December 23, 2020, that the parties had until January 8, 2021, to file their final lists of contentions, which Tran failed to do. The Armbrusters moved for sanctions on January 11, which motion the trial court took under advisement. Eight days later, after what was intended to be the first part of a bifurcated trial had already been held, the trial court ruled that Tran could not testify on her own behalf in a trial on her counterclaim, but only after verifying that she had still not filed her final list of contentions. In summary, despite being given two weeks to file a final list of contentions and—apparently—an eight-day second chance after being put on notice that additional sanctions were being sought, Tran still failed to file her final list of contentions. While we do not dispute Tran's contention that her inability to testify on her own behalf essentially prevented her from advancing her counterclaim, we still cannot say that, under the circumstances, the trial court erred in this regard, especially in the absence of any claim of good cause.

Conclusion

[19] The trial court did not err in concluding that Tran was liable pursuant to the Second Lease but did err in concluding that she was not liable pursuant to the First Lease. Moreover, the trial court did not err in imposing sanctions on Tran for violation of court orders to file her list of witnesses and exhibits and her list of final contentions by certain dates. Consequently, we affirm in part, reverse

in part, and remand for recalculation of damages in light of this memorandum decision.

[20] We affirm the judgment of the trial court in part, reverse in part, and remand with instructions.

Crone, J., and Tavitas, J., concur.