MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Estate of Paul E. Nonte and Jasper Southgate Industries, Inc.,

Appellants-Defendants/Counterclaim Plaintiffs/Third-Party Plaintiffs,

v.

Robert A. Gardner, II and Kelle Brind'Amour d/b/a Siblings Properties, LLC a/k/a Siblings, LLC,

Appellees-Plaintiffs/Counterclaim Defendants,

and

Jerry Werne and Duet Property Services, LLC,

Appellees-Third-Party Defendants.

June 2, 2021

Court of Appeals Case No. 20A-PL-1589

Appeal from the Dubois Circuit Court

The Honorable Gregory A. Smith, Special Judge

Trial Court Cause No. 19C01-1105-PL-198

Shepard, Senior Judge.

[1] The Estate of Paul E. Nonte[1] and Jasper Southgate Industries ("Southgate") appeal the trial court's judgment and order of damages in favor of Robert A. Gardner, II and Kelle Brind'Amour (collectively "Siblings") on their suit for breach of contract. We conclude that Paul Nonte, on behalf of Southgate, ratified the contract but that the aggregate amount upon which prejudgment interest was ordered is incorrect.

Facts and Procedural History

[2] At the time relevant here, Siblings were purchasing real estate on contract. Upon deciding to sell, Gardner engaged the services of Jerry Werne, a real estate agent. In February 2011, Paul Nonte ("Nonte"), president of Southgate, expressed to Werne his interest in purchasing the property, and Werne agreed to serve as a dual agent for both Siblings as seller and Southgate as buyer.

[3] On February 8, Southgate tendered a written offer to purchase the property for $650,000. The purchase agreement was prepared by Werne and listed the seller as "SIBLINGS LLC." Appellants' Supp. App. Vol. II, p. 16. Although Gardner and Brind'Amour apparently intended to form this company, it was not in existence at the time the purchase agreement was executed or at any time relevant here. Siblings accepted Southgate's offer the following day. As the

[1] Paul Nonte died after this lawsuit was filed, and Southgate moved to substitute his estate for him personally.

agent of both parties and without Southgate's knowledge, Werne subsequently substituted the first page of the agreement with a new first page that named the seller as "ROBERT A. GARDNER II AKA SIBLINGS LLC." Appellants' App. Vol II, p. 23.

[4] Thereafter, on March 11, the parties executed an amendment to the purchase agreement. The amendment extended the closing date, in consideration for which Southgate paid $5,000 toward the purchase price with a check made payable to Gardner. The amendment contained a line for the seller's signature, under which was typed "ROBERT A. GARDNER II." *Id.* at 29.

[5] Later that same month Nonte's son expressed concern to Werne about the transaction, including the identity of the owner of the property and whether the property was in a flood plain. On the eve of closing, Southgate advised it was not going through with the purchase.

[6] On May 26, 2011, Siblings sued for breach of contract. Nonte and Southgate filed a counterclaim against Siblings and a third-party claim against Werne and his firm. Following a bench trial in September 2019, the court entered judgment in favor of Siblings, along with findings and conclusions. Nonte and Southgate moved to correct error with the court's judgment. The court granted the motion in part but remained steadfast in its judgment for Siblings.

Issues

[7] Nonte and Southgate present two issues on appeal, which we restate as:

I. Whether the trial court erred by concluding Nonte ratified the contract; and

II. Whether the court erred in its calculation of prejudgment interest.

Discussion and Decision

[8] We review a trial court's ruling on a motion to correct error for an abuse of discretion, which occurs if the decision is against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law. *Kobold v. Kobold*, 121 N.E.3d 564 (Ind. Ct. App. 2019), *trans. denied*.

[9] When, as here, a trial court has entered Trial Rule 52 findings and conclusions, our standard of review is two-tiered. First, we determine whether the evidence supports the findings and second, whether the findings support the judgment. *VanHawk v. Town of Culver*, 137 N.E.3d 258 (Ind. Ct. App. 2019). Findings and conclusions will be set aside only if they are clearly erroneous, meaning there are no facts or inferences to support them. *Abrell v. Delaware Cty. Reg'l Wastewater Dist.*, 131 N.E.3d 725 (Ind. Ct. App. 2019). We accord substantial deference to the trial court's findings but not to its conclusions, and we evaluate questions of law de novo. *Blacklidge v. Blacklidge*, 96 N.E.3d 108 (Ind. Ct. App. 2018).

[10] A judgment is clearly erroneous when our review of the record leaves us with a firm conviction that a mistake has been made. *Abrell*, 131 N.E.3d 725. We may affirm a judgment on any legal theory, whether or not relied upon by the

trial court, as long as the findings are not clearly erroneous and support the theory adopted. *VanHawk*, 137 N.E.3d 258.

I. Ratification

[11] Nonte and Southgate contend the trial court erred in concluding that Nonte ratified the contract. First however, they devote a good portion of their brief to a discussion of who is the "injured party" and the applicability of the statute of frauds. Even assuming without deciding that the statute of frauds was properly raised in this case[2] and that the purchase agreement did not comply with its requirements, the agreement is merely rendered voidable not void. *See Jernas*, 53 N.E.3d 434 (contracts for sale of real property that do not satisfy statute of frauds are voidable, not void). Nonte and Southgate acknowledge that the agreement was voidable, not void. *See* Appellants' Br. p. 29 n.8.

[12] Ratification is the confirmation of a voidable act. *Indiana Ins. Co. v. Margotte*, 718 N.E.2d 1226 (Ind. Ct. App. 1999) (citing *Haggerty v. Juday*, 58 Ind. 154, 158 (1877)). "'Ratification applies when a party to a contract, with knowledge of facts entitling that party to rescind the contract, treats the contract as a continuing and valid obligation, thus leading the other party to believe that the contract is still in effect.'" *Smith v. McLeod Distrib., Inc.*, 744 N.E.2d 459, 465-66

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[2] The statute of frauds is an affirmative defense, and affirmative defenses must be specifically pleaded. *See* Ind. Trial Rule 8 (C) ("A responsive pleading shall set forth affirmatively and carry the burden of proving: . . . statute of frauds . . . ."). Generally, an affirmative defense, including the affirmative defense of the statute of frauds, is waived by failure to raise it in the pleadings. *See Jernas v. Gumz*, 53 N.E.3d 434 (Ind. Ct. App. 2016) (and cases cited therein), *trans. denied*.

(Ind. Ct. App. 2000) (quoting *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1236 n.6 (Ind. 1994)). Ratification may be inferred from the conduct of the parties; the acts, words, silence, and dealings, as well as many other facts and circumstances, may be shown as evidence tending to warrant the finding of ratification. *Heritage Dev. of Ind., Inc. v. Opportunity Options, Inc.*, 773 N.E.2d 881 (Ind. Ct. App. 2002).

[13] Nonte and Southgate argue the record establishes neither their knowledge of facts nor their treatment of the contract as a valid obligation. In its Conclusions 10 and 12, the court determined:

> 10. Even assuming the buyer, Jasper Southgate, could have avoided the contract as voidable due to the misnomer of the selling party as "Siblings, LLC" or because of Werne's substitution of page one of the Contract the Court finds Jasper Southgate ratified the Contract.
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> *****
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> 12. Jasper Southgate through Mr. Paul Nonte ratified the Contract when he signed the extension agreement and paid the extra Five Thousand Dollars ($5000.00) to Mr. Gardner.

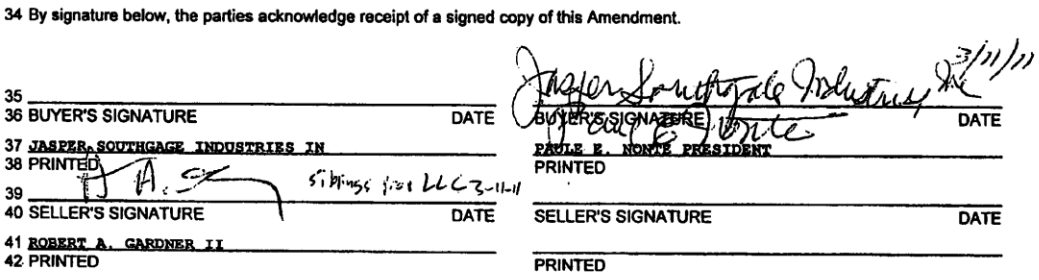
Appealed Order 1, p. 7. In support of these conclusions, the court found that:

> 31. At the latest, on March 11, 2011, with the payment of the additional funds for the extension for the amendment to the purchase agreement Mr. Nonte learned or should have known that Mr. Gardner was the real party in interest as the seller under the original purchase agreement because the additional Five Thousand Dollars ($5,000.00) was made payable to Mr. Gardner.

Id. at 4.

[14] As regards the concept of ratification, knowledge need not be proved by any special kind of evidence and may be inferred from facts and circumstances. *Heritage Dev. of Ind.*, 773 N.E.2d 881. Moreover, in this state the rule is well settled that when one has sufficient information to reasonably lead him to a fact, he must be deemed conversant with it. *Union State Bank v. Williams*, 169 Ind. App. 345, 348 N.E.2d 683 (1976).

[15] Here, Nonte and Southgate made a $5,000 check payable to Gardner. Furthermore, the amendment contained a line for the seller's signature, under which was typed "ROBERT A. GARDNER II." Appellants' App. Vol. II, p. 29. This information was conspicuously placed adjacent to the line where Nonte signed:


34 By signature below, the parties acknowledge receipt of a signed copy of this Amendment.

35 _____ _____
36 BUYER'S SIGNATURE DATE BUYER'S SIGNATURE DATE
37 JASPER SOUTHGAGE INDUSTRIES IN PAULE E. NONTE PRESIDENT
38 PRINTED PRINTED
39 _____ _____
40 SELLER'S SIGNATURE DATE SELLER'S SIGNATURE DATE
41 ROBERT A. GARDNER II _____
42 PRINTED PRINTED

Id. With this information in front of him, Nonte signed the amendment on behalf of Southgate and tendered the check made payable to Gardner.

[16] Further weakening Nonte and Southgate's position is the fact that Nonte apparently testified that the breach was unrelated to the identity of the seller and was instead due to the expenses Southgate would incur to make the property suitable to rent: "By that time—by that time, we had a chance to look

at the darn thing to see what it might have to cost to get the thing rentable . . . . Well, hell, yeah. I didn't want to spend a pot full of money of [sic] something that—questionable of whether I could rent it." Appellees' Br. p. 11.

[17] The foregoing facts and circumstances constitute an adequate basis from which to infer Nonte and Southgate's knowledge that Gardner was the seller of the property. *See Sanford v. Castleton Health Care Ctr., LLC*, 813 N.E.2d 411 (Ind. Ct. App. 2004) (under Indiana law, person is presumed to understand and assent to terms of contracts he or she signs), *trans. denied*.

[18] In addition, these same dealings demonstrate that Nonte and Southgate treated the purchase agreement as a valid obligation that was still in effect. Despite the fact that the check for $5,000 toward the purchase price of the contract was made out to Gardner and that Gardner was clearly listed as the seller on the amendment, Nonte still signed the amendment and tendered the check. The facts and circumstances here amount to Nonte and Southgate's acknowledgement that the purchase agreement was still binding, and they warrant the finding of ratification.[3]

II. Prejudgment Interest

[19] Nonte and Southgate assert the trial court erred in the course of ordering prejudgment interest. Specifically, they take issue with the court's inclusion in

[3] We reject Nonte and Southgate's attempt to impose a time requirement into this element of ratification.

the aggregate amount upon which it ordered prejudgment interest the sum that sibling Brind'Amour paid to maintain the property following the breach. They also ask this Court to consider adjusting the years-long period of prejudgment interest to account for long periods of inactivity in the case by Siblings.

[20] The evidence at trial showed that Brind'Amour paid $34,820.89 to maintain the property following the breach. The court added this amount to the amount of Siblings' damages under the terms of the contract, awarding an aggregate amount of $201,862.74 upon which prejudgment interest would accrue from October 8, 2011 through December 11, 2019. *See* Appealed Order 1, pp. 8, 9 (¶¶ 17, 21).

[21] Prejudgment interest is allowable on the principal amount from the time that amount was demanded or due. *DeGood Dimensional Concepts, Inc. v. Wilder*, 135 N.E.3d 625 (Ind. Ct. App. 2019). Here, the principal amount due under the contract was $167,041.85; the $34,820.89 in maintenance expenses is an add-on and was not addressed by the parties' contract. Accordingly, we remand to the trial court to remove this amount from the aggregate amount upon which prejudgment interest is calculated and order prejudgment interest only on the principal amount of $167,041.85.

[22] We must decline Nonte and Southgate's request to adjust the period of prejudgment interest to account for delays and inactivity. It is well settled that an award of prejudgment interest is generally not considered a matter of discretion. *WESCO Distrib., Inc. v. ArcelorMittal Ind. Harbor LLC*, 23 N.E.3d 682

(Ind. Ct. App. 2014). In *Olcott International & Co., Inc. v. Micro Data Base Systems, Inc.*, 793 N.E.2d 1063 (Ind. Ct. App. 2003), *trans. denied*, the trial court denied prejudgment interest to the appellee for the period of many years it had delayed in attempting to collect on the appellant's debt. On appeal, we held that, while we "underst[ood] the trial court's sentiment," the trial court "lacked discretion to deprive" the appellee of that prejudgment interest. *Id.* at 1078-79. We reversed and remanded with instructions to recalculate the prejudgment interest to include the period of time when the appellee did not pursue collection. *See also Fackler v. Powell*, 923 N.E.2d 973, 979 (Ind. Ct. App. 2010) (discretion concerning prejudgment interest is generally prohibited because prejudgment interest is awarded to fully compensate injured party for lost use of money; trial court did not have discretion to deny appellant prejudgment interest during time period she pursued claim in wrong court).

[23] As a final matter, Siblings request appellate attorney fees. When a contract provision provides that attorney fees are recoverable, appellate attorney fees may also be awarded. *King v. Conley*, 87 N.E.3d 1146 (Ind. Ct. App. 2017), *trans denied* (2018). In this case, the parties' purchase agreement provides for attorney fees, *see* Appellants' App. Vol. II, p. 27 (¶ Q., 11.), and Nonte and Southgate acknowledge such. Consequently, we remand to the trial court for a determination of reasonable appellate attorney fees.

Conclusion

[24] Based on the foregoing, we conclude that the trial court's determination that Nonte ratified the contract is not clearly erroneous. However, the aggregate amount upon which prejudgment interest was ordered is incorrect, and Siblings are entitled to appellate attorney fees. Accordingly, we affirm in part, but remand for a recalculation of prejudgment interest and a determination of appellate attorney fees.

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

Mathias, J., and Tavitas, J., concur.