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IN THE
COURT OF APPEALS OF INDIANA

Mark Baker,

Appellant-Plaintiff,

v.

Adam Pickering, Kathleen Pickering, Lauren Flanagan, and Kesslerwood East Lake Association, Inc.,

Appellees-Defendants

November 2, 2021

Court of Appeals Case No. 21A-MI-354

Appeal from the Marion County Superior Court

The Honorable John M.T. Chavis, Judge

Trial Court Cause No. 49D05-2006-MI-018967

May, Judge.

[1] Mark Baker appeals following the trial court's denial of his "Motion for Relief from Order." (App. Vol. III at 84.) In response, the Kesslerwood East Lake Association, Inc., ("the Association") argues Baker's appeal is not properly before us because the trial court's denial of Baker's motion was not a final order.[1] We agree and therefore dismiss his appeal for want of subject matter jurisdiction.

Facts and Procedural History

[2] Mark Baker lives next door to Adam and Kathleen Pickering in Indianapolis, and both properties border Lake Kesslerwood ("the Lake"). By virtue of the location of their properties, they are all members of the Association. The Association is a not-for-profit entity whose objective is to protect and maintain the Lake. Members of the Association are required to sign and adhere to a Declaration of Covenants and Restrictions ("Declaration"). This Declaration outlines certain rules regarding the placement and maintenance of piers. It also includes an article meant to govern disputes between members of the Association, which states:

> Section 2. Enforcement. The Association, any Owner, the Declarant or Developer shall have the right to enforce, by any

[1] Lauren Flanagan does not participate in this appeal. The Pickerings filed an appellee's brief, but they did not argue in the brief that Baker's appeal should be dismissed. Because we dismiss, we need not reach the merits of their arguments on appeal.

> proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration. Failure to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter. Attorneys' fees and costs of any such actions to enforce, or enjoin or restrain the violation or attempted violation of, this Declaration, or to recover damages for the breach or violation hereof, shall be assessed against and payable by any persons violating the terms hereof.
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> * * * * *
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> Section 4. Arbitration. In the event of any dispute arising among the Members which cannot be decided by the Board of Directors or the Architectural Review Board, as appropriate, under the provisions of this Declaration, each party to the dispute having an individual and distinctly opposing position shall choose one (1) arbitrator and such arbitrators shall choose one (1) additional arbitrator and the decision by the three (3) arbitrators, made by a majority of all the arbitrators, shall be binding on each of the disputing parties.

(App. Vol. II at 41-42.)

[3] The Pickerings constructed a dock extending from the shoreline into the Lake. On June 11, 2020, Baker filed a complaint in Marion Superior Court against the Pickerings alleging the dock violated the terms of the Declaration and interfered with Baker's right to access the area around the Lake. The complaint sought compensatory damages as well as declaratory and injunctive relief.

[4] The Pickerings filed an answer, counterclaim, and third-party complaint on August 10, 2020. The Pickerings denied the material allegations of Baker's complaint but asserted Baker failed to name Lauren Flanagan (the owner of an adjoining property) and the Association as indispensable parties pursuant to Indiana Trial Rule 19(A). Their counterclaim accused Baker of being the party in breach of the Declaration, and it asserted claims of intentional infliction of emotional distress, trespass, and abuse of process. The Pickerings' third-party complaint was filed against the Association. It alleged the Association approved their plans for the dock and, therefore, the Association has a duty to indemnify the Pickerings if Baker is entitled to any relief. Further, the Pickerings filed a motion to compel arbitration and stay proceedings pending arbitration based on the Declaration's arbitration clause.[2]

[5] Baker filed an answer to the Pickerings' counterclaim on September 30, 2020. Baker sought and was granted leave to amend his complaint to add the Association and Flanagan as additional defendants. He further filed an objection to the Pickerings' motion to compel arbitration in which he argued the arbitration provision in the Declaration did not apply to this dispute. On December 4, 2020, the trial court held a hearing on the motion to compel arbitration, and the trial court allowed the parties to submit post-hearing briefs. On January 5, 2021, the trial court granted the motion to compel arbitration.

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[2] The Association later joined this motion.

[6] On February 4, 2021, Baker filed a "Motion for Relief from Order," ostensibly pursuant to Indiana Trial Rule 60(B). Both the Association and the Pickerings opposed Baker's motion, and the trial court denied it on February 8, 2021. On March 2, 2021, Baker filed a notice of appeal. Baker asserted in his notice of appeal that he was appealing from a final judgment. On March 25, 2021, the Pickerings and the Association filed a joint motion to dismiss Baker's appeal on the basis that the notice of appeal was untimely and improper. Baker asserted his filing of the notice of appeal was timely because it was filed less than thirty days after the trial court denied his "Motion for Relief from Order." On April 15, 2021, the motions panel of this Court voted to deny the joint motion to dismiss. The parties then proceeded to briefing before this panel.

Discussion and Decision

[7] In its briefing before this panel, the Association reasserts that Baker's appeal should be dismissed. We retain inherent authority to revisit the motions panel decision while the appeal remains pending, *Core v. State*, 122 N.E.3d 974, 977 (Ind. Ct. App. 2019), and we choose to do so in this case. "Subject matter jurisdiction concerns a court's ability to hear and decide a case based on the class of cases to which it belongs . . . [and] 'dismissal for lack of subject matter jurisdiction takes precedence over the determination of and action upon other substantive and procedural rights of the parties.'" *Young v. Est. of Sweeney*, 808 N.E.2d 1217, 1219 (Ind. Ct. App. 2004) (quoting *Warrick Cnty. v. Weber*, 714 N.E.2d 685, 687 (Ind. Ct. App. 1999)). The presence of subject matter

jurisdiction is a legal determination that we evaluate de novo. *Id*. If we lack subject matter jurisdiction, then we must dismiss the appeal. *See Snyder v. Snyder*, 62 N.E.3d 455, 459 (Ind. Ct. App. 2016) (dismissing Husband's appeal because we lacked jurisdiction). While the Association has reasserted its claim that Baker's appeal should be dismissed, Baker chose not to file a reply brief. When a party fails to respond to issues raised by another party on appeal, we review the issues for prima facie error. *R.L. Turner Corp. v. Wressell*, 44 N.E.3d 26, 42 (Ind. Ct. App. 2015), *trans. denied*. "Prima facie means at first sight, on first appearance, or on the face of it." *Id*. (internal quotation marks omitted).

I. Final Order

[8] Indiana Appellate Rule 5 grants us jurisdiction over most appeals from final judgments. Appellate Rule 2(H) defines what constitutes a final judgment:

> A judgment is a final judgment if:
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> (1) it disposes of all claims as to all parties;
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> (2) the trial court in writing expressly determines under Trial Rule 54(B) or Trial Rule 56(C) that there is no reason for delay and in writing expressly directs the entry of judgment (i) under Trial Rule 54(B) as to fewer than all the claims or parties, or (ii) under Trial Rule 56(C) as to fewer than all the issues, claims or parties;
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> (3) it is deemed final under Trial Rule 60(C);

> (4) it is a ruling on either a mandatory or permissive Motion to Correct Error which was timely filed under Trial Rule 59 or Criminal Rule 16; or
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> (5) it is otherwise deemed final by law.

[9] The Association argues the order compelling arbitration "does not dispose of all claims as to all parties and does not contain the 'magic language' of Indiana Trial Rule 54(B) . . . . Therefore, it is not deemed 'final' under Indiana Appellate Rules 2(H)(1) or 2(H)(2)." (Association Appellee's Br. at 19.) In the joint verified motion to dismiss Baker's appeal, the Association and the Pickerings stated: "In Indiana, it is well settled that '[a]n order compelling arbitration is a final, appealable order if severable from other claims in the lawsuit.'" (Appellees' Joint Motion to Dismiss at 4 (quoting *Angell Enterprises, Inc. v. Abram & Hawkins Excavating Co.*, 643 N.E.2d 362, 364 (Ind. Ct. App. 1994)). However, in the Association's Appellee's Brief, the Association revisits the language it quoted from *Angell Enterprises*, and the Association asserts "when this language is tracked back through the case law, it appears to derive solely from circumstances where the order compelling arbitration was converted into a final judgment by use of the 'magic language' of Indiana Trial Rule 54(B)." (Association's Appellee's Br. at 22 n.5.)

[10] In *Angell Enterprises*, we analyzed whether a party's failure to appeal a trial court's order submitting the parties' respective crossclaims under Indiana Code section 32-8-3-9 (the Owner's Liability Statute) to arbitration meant the party

could not later argue before the trial court that the arbitrator exceeded his authority by fashioning an award that included compensation for damages incurred in excess of the Owner's Liability Statute claims. 643 N.E.2d at 364. We explained:

> An order compelling arbitration is a final, appealable order if severable from other claims in the lawsuit. *Albright v. Edward D. Jones & Co.* (1991), Ind. App., 571 N.E.2d 1329, 1331, *cert. denied*, 506 U.S. 818, 113 S. Ct. 61, 121 L.Ed.2d 29. Thus, a party may not contest arbitrability for the first time in its petition to vacate an arbitration award.

Id. We held however that a party's agreement to submit some claims to arbitration did not prevent the party from later arguing in the trial court that the arbitrator exceeded his authority in fashioning an arbitration award. *Id*. Therefore, despite its language that an order compelling arbitration is a final, appealable order, the holding in *Angell Enterprises* did not concern whether an order compelling arbitration was appealable as a final judgment. Further, when we examine the case upon which *Angell Enterprises* relied, *Albright*, that case also does not contain such a holding.

[11] In *Albright*, clients of an investment firm sued the firm after sustaining substantial losses on their investments. 571 N.E.2d at 1330. The investment firm moved to compel arbitration. *Id*. The trial court entered an order compelling arbitration and certified its order as a final judgment pursuant to Trial Rule 54(B). *Id*. at 1331. On appeal, the investment firm argued the trial court's certification of the order compelling arbitration was erroneous. *Id*. We

held "an order compelling arbitration, *when properly certified by the trial court*, is a final appealable order despite the existence of other claims in the lawsuit if the arbitration order is severable from the rest of the claims in the lawsuit." *Id*. at 1332 (emphasis added).

[12] *Albright* was decided in the wake of *Evansville-Vanderburgh School Corporation v. Evansville Teachers Association*, 494 N.E.2d 321 (Ind. Ct. App. 1986). In *Evansville-Vanderburgh*, a teachers' association filed a complaint against a school corporation seeking arbitration of a teacher's grievance, an order directing the school corporation to comply with the contract between the teachers' association and the school corporation, and unspecified damages. *Id*. The trial court entered an order compelling arbitration, and the school corporation appealed. *Id*. The school corporation asserted the order compelling arbitration was an appealable final order, and the teachers' association argued the order was interlocutory and not presently appealable. *Id*. at 322. We noted a division of authorities and opined "that an order compelling arbitration is an appealable final order in an action solely for that purpose because such an order has fully decided the issue before the court." *Id*. at 323-24. However, we observed the complaint did not simply seek an order compelling arbitration, it also sought an order directing compliance with the contract and damages. *Id*. Therefore, the order compelling arbitration "was not appealable, as a matter of right, as a final judgment" because it did not dispose of all claims and the school corporation had not had the order certified as a final judgment pursuant to Trial Rule

54(B).[3] *Id*. at 324. Nevertheless, we held that we had jurisdiction over the appeal because the school corporation had petitioned for us to accept jurisdiction of an interlocutory appeal, and we had accepted jurisdiction. *Id*. at 325. Synthesizing the *Evansville-Vanderburgh* case, the *Albright* court explained:

> While the *Evansville-Vanderburgh* court found that the order compelling arbitration was appealable because jurisdiction of the interlocutory appeal had been accepted pursuant to Appellate Rule 4(B)(6),[4] the court intimated that the order would have been appealable as a final order if the trial judge had certified it pursuant to Trial Rule 54(B).

571 N.E.2d at 1332 (footnote added).

[13] In the case at bar, Baker's complaint sought compensatory damages as well as declaratory and injunctive relief in connection with the placement of the Pickerings' dock. Unlike the plaintiff in *Evansville-Vanderburgh*, Baker did not seek an order compelling arbitration, and while the Pickerings moved to compel arbitration, they also seek in their counterclaim damages from Baker for breach of contract and a host of torts. Therefore, the order compelling arbitration does

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[3] We note this approach is similar to how federal courts have interpreted the Federal Arbitration Act ("FAA") to mean an order compelling arbitration and dismissing the underlying claims is appealable, but an order compelling arbitration and staying the case is not immediately appealable. *Compare Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89, 121 S. Ct. 513, 521 (2000) (holding an order compelling arbitration and dismissing a party's underlying claims is a "final decision with respect to an arbitration" within the meaning of the FAA such that the order is appealable), *with Preferred Care of Del., Inc. v. Est. of Hopkins*, 845 F.3d 765, 771 (6th Cir. 2017) (holding trial court order compelling arbitration and staying the underlying suit was not appealable).

[4] This citation concerns the Appellate Rule governing the initiation of interlocutory appeals at the time of the *Evansville-Vanderburgh* decision.

not constitute a final order under either Indiana Appellate Rule 2(H)(1) or Rule 2(H)(2) because the order does not resolve the parties' claims for damages and the order was not certified pursuant to Trial Rule 54(B).[5] *See, e.g., Maynard v. Golden Living*, 56 N.E.3d 1232, 1237 (Ind. Ct. App. 2016) (treating an order compelling arbitration as an interlocutory order); and *Brumley v. Commw. Bus. Coll. Educ. Corp.*, 945 N.E.2d 770, 774-75 (Ind. Ct. App. 2011) (same).

[14] In addition to arguing that the order compelling arbitration is not a final order pursuant to Indiana Appellate Rules 2(H)(1) or 2(H)(2), the Association argues the order is not a final order pursuant to Appellate Rule 2(H)(5) because "it does not deny an application to compel arbitration or grant an application to stay pending further hearing." (Association's Appellee's Br. at 19.) The Association directs us to Indiana's Arbitration Act, which provides an appeal may be taken from:

> (1) an order denying an application to compel arbitration made under section 3 of this chapter (or IC 34-4-2-3 before its repeal);

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[5] While Baker argued in response to the Association's motion to dismiss that his "Motion for Relief from Order" challenging the order compelling arbitration should be considered a motion under either Trial Rule 59 or Trial Rule 60, and thus appealable under Appellate Rule 2(H)(3) or 2(H)(4), it was not a proper motion under either Trial Rule because the trial court's order was a not a final judgment. *See* Trial Rule 59(C) ("The motion to correct error, if any, must be filed not later than thirty (30) days after the entry of a **final judgment** is noted in the Chronological Case Summary.") (emphasis added); *see also* Trial Rule 60(B) ("On motion and upon such terms as are just the court may relieve a party or his legal representative from a **judgment, including a judgment by default**," for one of eight specified reasons.) (emphases added).

> (2) an order granting an application to stay arbitration made under section 3(b) of this chapter (or IC 34-4-2-3(b) before its repeal);
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> (3) an order confirming or denying confirmation of an award;
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> (4) an order modifying or correcting an award;
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> (5) an order vacating an award without directing a rehearing; or
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> (6) a judgment or decree entered pursuant to the provisions of this chapter (or IC 34-4-2 before its repeal).

Ind. Code § 34-57-2-19. Notably, this statute does not provide for the appealability of an order compelling arbitration, and thus, it does not make the trial court's order compelling arbitration a final order.

II. Interlocutory Order

[15] Having concluded the order compelling arbitration is not a final order, we turn to whether we have jurisdiction pursuant to Appellate Rule 14. Ind. R. App. Proc. 5. The three portions of that rule that might be relevant are 14(A), 14(B), and 14(D).[6]

[6] Rule 14(C) concerns interlocutory appeals from orders granting or denying class action certification, which is not applicable in the case-at-bar.

A. Appellate Rule 14(A)

[16] Appellate Rule 14(A) provides that some appeals from interlocutory orders may be taken as a matter of right if a notice of appeal is filed within thirty days after notation of the interlocutory order is entered in the Chronological Case Summary. However, an order compelling arbitration is not one of these interlocutory orders. *See* Rule 14(A) (list of interlocutory orders appealable as a matter of right). Therefore, we do not have jurisdiction under Appellate Rule 14(A).

B. Appellate Rule 14(B)

[17] Appellate Rule 14(B) allows a party to appeal an interlocutory order if the trial court certifies the order and we accept jurisdiction over the appeal. A party seeking to pursue a discretionary interlocutory appeal must first move the trial court to certify an order for interlocutory appeal within thirty days from the date the interlocutory order is noted in the Chronological Case Summary. *Id*. If the trial court certifies the order for interlocutory appeal, then we retain discretion to accept jurisdiction of the appeal. *Id*. Once we accept jurisdiction, a party has fifteen days to file a notice of appeal. *Id*. However, Baker did not follow the procedure outlined in Rule 14(B), and we therefore did not obtain jurisdiction in this manner.

C. Appellate Rule 14(D)

[18] Appellate Rule 14(D) grants us jurisdiction over interlocutory appeals if provided by statute. However, it is the litigant's obligation to direct us to any

statute the litigant believes empowers us with jurisdiction in accordance with Appellate Rule 14(D). *See Young*, 808 N.E.2d at 1220 ("Young has not directed us to a statute that would provide us with jurisdiction over this interlocutory appeal . . . and we will not undertake Young's burden of searching the Indiana Code to establish that such a statute exists."). As noted above, Indiana Code section 34-57-2-19 does not provide for the immediate appealability of an order compelling arbitration, and Baker does not point us to any other authority that he believes authorizes an interlocutory appeal under Rule 14(D). Therefore, we do not have jurisdiction under Rule 14(D).

[19] Consequently, Baker has not met the requirements to bring an appeal of an interlocutory order under any of the subsections of Appellate Rule 14. Accordingly, we dismiss Baker's appeal because he is attempting to pursue an interlocutory appeal without following the procedure for doing so outlined in the Rules of Appellate Procedure. *See Bacon v. Bacon*, 877 N.E.2d 801, 805 (Ind. Ct. App. 2007) (dismissing appeal for lack of jurisdiction because the order being appealed was not a final judgment, an interlocutory order appealable as a matter of right, or an order certified for interlocutory appeal by the trial court), *reh'g denied*, *trans. denied*.

Conclusion

[20] The trial court's order compelling arbitration was not a final judgment under Appellate Rule 2(H). The Indiana Arbitration Act does not provide for the immediate appealability of an order compelling arbitration, and the trial court's

order neither disposed of all claims nor certified the order as a partial final judgment pursuant to Trial Rule 54(B). Baker's appeal also is not a proper interlocutory appeal because he did not follow the procedure specified Appellate Rule 14 for pursuing an interlocutory appeal and it is not an interlocutory order appealable as of right. Therefore, we lack subject matter jurisdiction and must dismiss Baker's appeal.

[21] Dismissed.

Vaidik, J., and Molter, J., concur.