MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kevin Washington and
Karen Washington,

Appellants-Plaintiffs,

v.

Christina M. Perry and
Leonard Perry,

Appellees-Defendants.

March 19, 2021

Court of Appeals Case No.
20A-PL-1419

Appeal from the Hamilton
Superior Court

The Honorable Michael A. Casati,
Judge

Trial Court Cause No.
29D01-1706-PL-5566

Weissmann, Judge.

[1] Two married couples—the Washingtons and the Perrys—entered into a lease-to-purchase agreement to give the Washingtons more time to obtain financing to purchase the Perrys' home. With no contractual deadline for performance and confusion over who was supposed to pay for what, the parties inevitably ended up in court.

[2] Almost five years after the agreements were signed, the Washingtons had not completed the purchase and the Perrys sued to regain possession of their home. The Washingtons countersued, claiming, among other things, that the Perrys owed them more than $30,000 in reimbursements for necessary home repairs, nonpayment of which impeded their ability to pay for HOA fees and rent. The Washingtons also belatedly added a claim for breach of the covenant of quiet enjoyment. The trial court ultimately granted partial summary judgment in favor of the Perrys, including repossession of the home. We affirm the trial court's order denying the Washingtons' tardy claim for breach of quiet enjoyment. However, genuine material issues of fact remain concerning whether the Washingtons breached the contract and whether the Perrys owe for repairs. We therefore reverse and remand for further proceedings.

Facts

[3] Kevin and Karen Washington wanted to purchase the home of Christina and Leonard Perry for $399,999. The Washingtons did not qualify for financing, but the Perrys were willing to make a deal. In October 2012, the families signed a purchase agreement, financing addendum, and lease to purchase agreement

(collectively, "the Agreements"), whereby the Washingtons would live in the Perrys' home while developing the income history necessary to qualify for financing to complete the purchase.

[4] Per the agreement, the Washingtons paid the Perrys $40,000, all of which was to apply as a nonrefundable down payment. Appellant's App. Vol. II p. 120. Monthly rent was $2,500, and payments made after the 5th of the month were subject to a $50 late fee, plus an additional $10 for every day the rent was not paid. *Id.* The Washingtons were also responsible for HOA fees "if applicable." *Id.* The agreement failed to specify the time for the Washingtons to acquire financing, leaving the term as "NA." *Id.* at 113.

[5] By May 2017, almost five years after executing the documents, the Washingtons still had not completed the purchase of the home. They also stopped paying HOA fees in 2017. In that year, they tendered payment for HOA fees, but their check was returned because the Perrys had set up an automatic online payment account and paid the fees. The Perrys sued to evict the Washingtons in Small Claims Court.[1] The Washingtons countered with a complaint for damages stemming from multiple home repairs the Washingtons made and the Perrys refused to reimburse. The Perrys counterclaimed, alleging the Washingtons were late with their lease payments, failed to pay any late fees, failed to maintain the property, failed to pay HOA fees, and failed to complete

[1] The Perrys later dismissed the eviction action.

the purchase. The Perrys requested the trial court enter a judgment declaring the Perrys were warranted in cancelling the Agreements, evicting the Washingtons from the home, and awarding the Perrys damages based on the Washingtons' alleged breaches of the agreements.

[6] Both parties moved for summary judgment on their respective claims. After a hearing, the trial court granted partial summary judgment to the Perrys, finding that:

- a reasonable time had lapsed for the Washingtons to complete the purchase of the Perrys' home;
- the Perrys were entitled to retain the Washingtons' $40,000 down payment as liquidated damages;
- the Washingtons failed to notify the Perrys of the need for the 2018 repairs pursuant to the Indiana residential landlord-tenant statutes and, therefore, were not entitled to reimbursement for those expenses;
- the Washingtons failed to properly assert their covenant of quiet enjoyment claim;
- the Perrys are entitled to late fees for all late lease payments;
- the Washingtons breached the agreements by failing to pay the HOA fees, and were required to satisfy any outstanding HOA fees; and
- the Perrys are entitled to possession of the property.

The Washingtons then launched this interlocutory appeal pursuant to Indiana Appellate Rule 14(A)(4).

Standard of Review

[7] The standard of review for appeals from summary judgment is well-settled. *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016). A grant of summary judgment is reviewed *de novo*. *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009). Summary judgment should only be granted if evidence designated pursuant to Indiana Trial Rule 56(C) shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Goodwin*, 62 N.E.3d at 386. The party moving for summary judgment has the burden of meeting these two requirements. *Id.* Once the moving party has met its burden, the burden shifts to the non-moving party to set forth facts demonstrating a genuine issue. *Id.* Where facts or inferences are in doubt, they must be construed in favor of the non-moving party. *Id.* "The party appealing the trial court's summary judgment determination bears the burden of persuading us the ruling was erroneous." *Ryan v. TCI Architects/Eng'rs/Contractors, Inc.*, 72 N.E.3d 908, 913 (Ind. 2017).

Discussion and Decision

[8] The Washingtons ask us to reverse the trial court on three grounds. First, they dispute the trial court's application of the Indiana residential landlord-tenant statutes, which govern their repair reimbursement claim. Second, they argue that any finding of breach of contract was in error. Finally, they argue that the trial court improperly disposed of their claim under the common law covenant of quiet enjoyment.

I. Repair Costs

[9] The Washingtons allege that they were forced to make more than $30,000 of repairs to the home, which the Perrys must reimburse. Most of these costs—including more than $15,000 to repair the basement after flooding in 2013 and almost $10,000 to replace the failing furnace and A/C system in 2017—were not part of the summary judgment order. But the court did dismiss the Washingtons' claim for more than $10,000 in reimbursement stemming from 2018 flood damage. The court found that the Washingtons failed to properly notify the Perrys of the damage. This ruling was in error.

[10] Indiana's residential landlord-tenant statutes require landlords to maintain any electrical systems, plumbing systems, sanitary systems, and systems for heating, ventilation and air conditioning. Ind. Code § 32-31-8-5. To enforce these obligations, a tenant may bring suit if: (1) the tenant has notified the landlord that the landlord is not in compliance; (2) the landlord has been given a reasonable amount of time to make repairs; and (3) the landlord fails or refuses to repair or remedy the condition described in the tenant's notice. Ind. Code § 32-31-8-6(b). Lease to purchase agreements are leases under the statute. *See Rainbow Realty Grp., Inc. v. Carter*, 131 N.E.3d 168, 173 (Ind. 2019).

[11] The parties agree that the Washingtons informed the Perrys that the flood occurred. Appellant's App. Vol. VI p. 95. But the Perrys argue they needed details, including invoices, photographs, or other information, to be adequately notified. *Id.* at 91; Appellee's Br. pp. 23-24. We can find no statutory basis for

the level of specificity the Perrys demand. The statute merely states that a tenant must notify their landlord when the landlord is not in compliance with their statutory obligations. I.C. § 32-31-8-5. In *Husainy v. Granite Mgmt., LLC*, this court held that a tenant's email to management saying, "We haven't had hot water for the past few days . . ." was sufficient to establish notice. 132 N.E.3d 486, 496 (Ind. Ct. App. 2019). The tenant in *Husainy* was not required to diagnose the underlying problem to demand his landlord act, and neither were the Washingtons. Their message to the Perrys that "significant rains resulted in a flooded basement" satisfied the notice requirement. Summary judgment on this issue was therefore improper.

II. Contract Claims

[12] Next, the Washingtons dispute the trial court's findings that the time for performance under the contract had lapsed, resulting in breach, and that the Washingtons further breached by failing to make HOA payments. We find issues of material fact as to both breaches and reverse and remand the summary judgment order. It follows that any ruling on remedies stemming from these breaches was likewise premature.

A.Time for Performance

[13] The trial court ruled that the agreements did not include a deadline for performance, an essential term the court found could be implied as a matter of law. The court did not define what would constitute a reasonable time for performance but nevertheless determined that time had lapsed. The

Washingtons argue that the "reasonable" time for performance—that is, completing the purchase—is a question of fact, not of law. We agree and reverse the grant of summary judgment on this issue.

[14] "When the parties to an agreement do not fix a date certain for performance, the law implies a reasonable time." *Ponziano Constr. Servs. Inc. v. Quadri Enters., LLC*, 980 N.E.2d 867, 874 (citing *The Winterton, LLC v. Winterton Invs., LLC*, 900 N.E.2d 754, 764 (Ind. Ct. App. 2009). But "[w]hat constitutes a reasonable time under the circumstances is a question of fact." *Hamlin v. Steward*, 622 N.E.2d 535, 540 (Ind. Ct. App. 1993) (citing *Bond v. Peabody Coal Co.*, 450 N.E.2d 542, 549 (Ind. Ct. App. 1983)). Perhaps contradictory on their face, these statements of law are actually in accord. *See Harrison v. Thomas*, 761 N.E.2d 816, 818-19 (Ind. 2002). The law assumes there is a deadline for performance, and the facts establish what is a reasonable time. *Id.* "What constitutes a reasonable time depends on the subject matter of the contract, the circumstances attending the performance of the contract, and the situation of the parties to the contract." *Winterton*, 900 N.E.2d at 764.

[15] In *Winterton*, this court looked to the contract itself to determine reasonable time for performance. 900 N.E.2d at 764. The agreements in *Winterton* allowed extensions of not more than 90 days, illuminating the parties' intention to perform within months. The agreements here do little to elucidate the intended timeframe. The Washingtons' $40,000 down payment was to be paid over fifteen months. *Id.* at 120. Their lease payments were monthly. *Id.* And the agreements included a financing deadline of "NA." Appellant's App. Vol. II p.

113. Judging solely by the terms of the agreements, we cannot say with confidence that a reasonable time for performance has lapsed.

[16] Turning to the subject matter of the contract, the parties generally agree that the Washingtons needed two years to develop the income history necessary to qualify for financing before they could close on the home. But they dispute when the Washingtons actually had to close. The Washingtons assert that, although they intended to "close as soon as [they] could," the agreement was "flexible," contemplating performance within ten years. Appellant's App. Vol. II, p. 147-48; Vol. III, pp. 120, 133.

[17] The Perrys argue they would not have entered into the agreement where closing was delayed for more than two years. Appellant's App Vol. II, pp. 99, 109. A March 2017 letter from the Perrys' attorneys to the Washingtons reflects this understanding, stating, "You and Mr. and Mrs. Perry agreed at the time the LPA was signed that you would purchase the Property by December 2014. . . . The fact remains you have not purchased the Property, even with an additional two years to obtain financing." Appellant's App. Vol. III p. 3. The Perrys attempted to evict the Washingtons shortly after. *Id.* at 5.

[18] These disagreements present a genuine issue of material fact as to the reasonable length of time the Washingtons had to close on the property.

Summary judgment regarding the time for performance was therefore improper.[2]

B. HOA Dues & Late Fees

[19] The trial court also granted summary judgment based on the Washingtons' failure to pay HOA fees. The Washingtons paid the fees until 2017 when they say their tendered check was returned after the Perrys set up an online payment account and started paying the HOA fees. The Washingtons argue that they thought the Perrys had assumed responsibility for the dues. Moreover, the Washingtons complain that their ability to pay both HOA fees and their rent was impeded by the Perrys' refusal to reimburse them for home repairs, detailed in Part I, *supra*.

[20] Whether or not the Perrys were the architects of the Washingtons' late lease payments and failure to pay HOA fees is an issue of material fact. "A party cannot impede performance of the contract and then claim damages due to delay of performance." *Ponziano Constr. Servs. Inc.*, 980 N.E.2d at 874.

[21] Genuine issues of material fact exist concerning whether the Perrys' assumption of the HOA fees in 2017 deprived the Washingtons of the ability to perform on

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[2] The Washingtons also argue that the agreement actually included a deadline for performance: specifically, "NA." Appellant's App. Vol. II p. 113. According to the Washingtons, a genuine issue of material fact arose over the meaning of "NA" and this dispute must be left to a factfinder. However, the Washingtons fail to identify how the two parties define "NA" differently. As the parties agree the language in the contract does not specify a deadline, the Washingtons' argument that "NA" is ambiguous and requires jury resolution is unavailing.

this aspect of the contract. Additionally, the Washingtons documented their more than $30,000 in repair expenses and stated in a sworn affidavit that these costs "placed a significant financial strain upon us" and "impaired our ability to make the $2,500 monthly payments to the Perrys and the Homeowner's Association dues . . ." Appellant's App. Vol. III p. 143. The Perrys did not respond to the Washingtons' allegation that their failure to reimburse these costs impeded the Washingtons' ability to perform.

[22] Finding genuine issues of material fact, we reverse and remand the finding of breach for failure to pay HOA fees and the award of late fees.

C. Remedies

[23] Both parties raise issues concerning remedies awarded based on the Washingtons' contractual breach. Because summary judgment was inappropriate as to breach, any findings related to remedies flowing from these breaches were also improper and are also reversed and remanded.

III. Covenant of Quiet Enjoyment

[24] Finally, the trial court found that the Washingtons improperly asserted their claim for violation of the common law covenant of quiet enjoyment by first raising it in their reply brief to the Perrys' motion for summary judgment in violation of Local Rule 213.20. That rule specifies: "A moving party's Reply Memorandum may not raise any new issue not raised in the moving party's principal Motion and Supporting Memorandum."

[25] The Washingtons contest this ruling, arguing that the trial court abused its discretion when it struck their quiet enjoyment claim after allowing them to amend their complaint. The trial court did grant the Washingtons leave to file that amended complaint based on a motion that mentioned solely statutory, not common law, claims. Appellee's App. Vol. II, pp. 10-15. Nevertheless, the amended complaint included a claim under the common law covenant of quiet enjoyment. Appellant's App. Vol. VII p. 128. The Perrys filed a motion to strike all of the new claims in the amended complaint, but only the covenant of quiet enjoyment claim fell. *Id.* at 204. If that portion of the amended complaint is reinstated, the Washingtons maintain the trial court erred in finding they raised their quiet enjoyment claim for the first time in their reply brief.

[26] Trial courts have broad discretion in granting motions to strike; such a ruling will only be reversed where prejudicial error is clearly shown. *Dreyer & Reinbold, Inc. v. AutoXchange.com, Inc.*, 771 N.E.2d 764, 768 (Ind. Ct. App. 2002). Motions to strike are granted for "any insufficient claim or defense or any redundant, immaterial, impertinent, or scandalous matter." Ind. Trial Rule 12(F). The motion is also properly utilized to "strike a response to an order or rule which introduces new material or allegations not previously made and which are not introduced pursuant to a right to amend a pleading." *Dreyer & Reinbold, Inc.*, 771 N.E.2d at 768.

[27] In this case, the Washingtons raised the covenant of quiet enjoyment in an amendment to the complaint without specific approval of the trial court and absent any other authority. Appellee's App. Vol. II p. 10. As such, that claim

was not introduced pursuant to a right to amend a pleading. Instead, it was introduced in a reply brief, in violation of Local Rule 213.20. As the amendment was doubly improper, the trial court did not abuse its discretion in striking the claim. We therefore affirm the portion of the trial court's order on summary judgment finding the Washingtons failed to properly assert their quiet enjoyment claim.

IV. Conclusion

[28] In summary: we reverse and remand the trial court's finding that the Washingtons' notice of the 2018 flooding event was insufficient; we reverse and remand the trial court's findings of breach and its findings of remedies stemming from breach; and we affirm the trial court's finding that the Washingtons did not properly assert their covenant of quiet enjoyment claim.

[29] We affirm in part, reverse in part, and remand for further proceedings.

Mathias, J., and Altice, J., concur.