MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT

Christopher J. McElwee
Monday McElwee Albright
Indianapolis, Indiana

ATTORNEY FOR APPELLEE

Christopher P. Jeter
Massillamany Jeter & Carson LLP
Fishers, Indiana

IN THE COURT OF APPEALS OF INDIANA

DERR Enterprises, LLC,
Appellant-Defendant,

v.

Union City Indiana Properties, LLC,
Appellee-Plaintiff

September 14, 2022

Court of Appeals Case No. 21A-CC-2305

Appeal from the Hamilton Superior Court

The Honorable Jonathan M. Brown, Judge

Trial Court Cause No. 29D02-2002-CC-1726

May, Judge.

[1] DERR Enterprises, LLC ("DERR") appeals following the trial court's orders granting summary judgment in favor of Union City Indiana Properties, LLC ("Union City") and denying DERR's motion to correct error. DERR raises one issue on appeal, which is whether the trial court erred by denying DERR's

motion to correct error because the grant of summary judgment for Union City was erroneous. We reverse and remand.

Facts and Procedural History

[2] On July 2, 2018, DERR, a wholesaler of hospitality and restaurant products, agreed to lease a commercial property located at 107 South Main Street in Summitville, Indiana (hereinafter, "the Property"), from Union City, a business that owns and leases commercial real estate. According to the commercial lease agreement, the lease was to run from July 2, 2018, until July 2, 2020. The lease agreement required DERR to pay a base rent of $3,874.00 per month. The agreement also included a clause that stated: "This Agreement contains a complete expression of the agreement between the parties and there are no promises, representations or inducements except such as are herein provided." (App. Vol. II at 30.)

[3] DERR began operating its business at the Property, but it eventually became economically unfeasible to continue business operations at the location. On June 27, 2019, Rodi Rozin, DERR manager, emailed Joshua Orahood, the principal owner of Union City:

> Hi Josh,
>
> As we discussed yesterday over the phone, we have to close our operation in Summitville due to continued weakness in our business. We plan to wind everything down by December 31,

> 2019. I hope you will work with us to terminate our lease 6 months early.
>
> Please let me know if you need anything else from my side. Jamie and the rest of the team have been informed, so if you need access to the building feel free to coordinate through Jamie.
>
> Thanks for your understanding and cooperation.
>
> Best,
>
> Rodi

(*Id*. at 129.) Orahood then replied:

> Rodi
>
> Received. Are you shutting down the whole business or just the Summitville location?
>
> What are you going to do with the equipment at Summitville? We may be interested in some of it like the forklifts, shop tools etc. if you plan to sell them.
>
> Regarding Jamie-if she's looking for a job, we might be able to employ her in our business and actually utilize that building for another segment we have, not sure but possibly. Please send her my contact info when convenient and I will see what I can do. She seemed pretty sharp.
>
> Thanks for the heads up. Sorry to hear that things took a bad turn and wish you all better fortunes in the future.

(*Id*. at 128.)

[4] Sometime in October or November 2019, Union City listed the Property online as available for lease. On November 25, 2019, Rozin emailed Orahood:

> Josh,
>
> We are wrapping up production in Summitville. The equipment auction is on December 4th. We will spend the remaining time cleaning up.
>
> Since December is our last month, would it be possible to apply our deposit against the rent payment? As I've shared with you before, the business is not doing well, and I am trying to keep the lights on in my other location.
>
> Your help with this would be greatly appreciated.
>
> Thanks,
>
> Rodi

(*Id*. at 70.) Orahood replied later that day:

> Rodi-I've got a business to run as well and lots of mouths to feed, and if I recall correctly, you wanted to have us sign a 2 year lease agreement so you could get your business loan. I shifted my business plans around and made significant investments in alternate real estate to accommodate you, in consideration of the lease agreement.
>
> Our expectation is to be paid to the completion of the term laid out in the lease agreement.

> Thanks

(*Id*. at 69-70.) Rozin wrote back:

> Josh,
>
> With all due respect, I gave you 6 months notice and my understanding was that you were ok with early termination. This is the first time I am hearing of your expectation to get paid through June. . . . I am really shocked considering we had a discussion and you never brought this up.
>
> Thanks,
>
> Rodi

(*Id*. at 69.) DERR hired an outside contractor and additional employees to help it vacate the Property by the end of December, and it sold most of its equipment at the December auction.

[5] On February 21, 2020, Union City filed a complaint alleging DERR breached the lease agreement by discontinuing its rent payments in December 2019 and by damaging the Property and leaving business personal property behind. On March 4, 2021, Union City filed a motion for summary judgment. Union City argued the lease agreement was a valid contract, which DERR breached by vacating the property before expiration of the lease term. Union City asserted it never agreed to shorten the lease term, but to the extent DERR contends there was such an agreement, "there was no consideration to support a modification of the Contract." (*Id*. at 47.) DERR filed a memorandum in opposition to

Union City's motion for summary judgment in which DERR argued the contract was orally modified by agreement to allow early termination. In support of its memorandum, DERR submitted an affidavit from Rozin, in which he averred:

> 5. In June 2019, on behalf of [DERR], I notified Josh Orahood, the Plaintiff's owner ("Landlord"), that due to ongoing business difficulties, [DERR] would be unlikely to successfully complete the lease term and requested an early lease termination effective December 31, 2019.
>
> 6. The Landlord agreed to the early termination at that time in June 2019. Shortly after he agreed to the early lease termination and on numerous occasions, the Landlord stated that he planned to use the premises for his own business.
>
> * * * * *
>
> 10. All of [DERR's] property had been removed from the premises by the end of December 2019. The only remaining items in the premises were racking Landlord asked to be left behind, an antique safe and antique table owned by Landlord, and some heaters that Landlord asked to be left at the premises. Any other remaining items were fixtures that are physically connected to the premises, which would have been damaged had the fixtures been removed, or property required for building operations.
>
> * * * * *
>
> 17. [DERR] did not abandon the premises or its property. [DERR] and the Landlord agreed that the lease would terminate

> on December 31, 2019 and that [DERR] would vacate the premises by that time.

(*Id*. at 104-107.)

[6] The trial court held a hearing on Union City's motion for summary judgment on June 21, 2021. At the hearing, Union City argued Orahood's June 27, 2019, reply to Rozin's e-mail was not an amendment to the lease agreement, and therefore, DERR breached the lease agreement by vacating the Property early. DERR argued a genuine issue of material fact existed regarding whether the contract had been orally modified to allow for early termination. DERR asserted the e-mail followed a conversation between Rozin and Orahood, and it was during that conversation the parties orally agreed DERR would be allowed to terminate its lease early. DERR also argued the parties' actions between June and December 2019 indicated both parties anticipated the lease term ending early. DERR explained:

> I don't think the email itself would be sufficient to create the modification of the contract. Our client's position is that these folks had a call by phone the day before and hashed it out there, and this is kind of the follow up email to document that they had talked.
>
> THE COURT: I mean, it would have been helpful if they had documented actually what the agreement was.
>
> [DERR:] Absolutely.

(Tr. Vol. II at 10.) On August 6, 2021, the trial court issued an order granting Union City's motion for summary judgment. The trial court entered judgment in favor of Union City and awarded Union City total damages of $82,945.90. DERR then filed a motion to correct error asserting genuine issues of material fact existed regarding whether the lease agreement was orally modified and how much damages Union City incurred. Union City filed a response to DERR's motion, and the trial court summarily denied the motion on September 21, 2021.

Discussion and Decision

[7] DERR appeals following the trial court's denial of its motion to correct error. "Generally, a trial court's ruling on a motion to correct error is reviewed for an abuse of discretion." *Poiry v. City of New Haven*, 113 N.E.3d 1236, 1239 (Ind. Ct. App. 2018). A trial court abuses its discretion when its decision is against the logic and effect of the facts and circumstances before it or when it misinterprets the law. *Id*. "However, where the issues raised in the motion are questions of law, the standard of review is de novo." *Id*.

[8] DERR's motion to correct error alleged the trial court erred when it granted summary judgment in favor of Union City because DERR's designated evidence created a genuine issue of material fact regarding whether the parties agreed to shorten the lease term. Our standard of review following the grant of a motion for summary judgment is well-settled:

> We review summary judgment using the same standard as the trial court: Summary judgment is appropriate only where the designated evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. All facts and reasonable inferences are construed in favor of the non-moving party. Where the challenge to summary judgment raises questions of law, we review them de novo.

Ind. Repertory Theatre v. Cincinnati Cas. Co., 180 N.E.3d 403, 406-07 (Ind. Ct. App. 2022) (internal citations omitted), *reh'g denied*, *trans. denied*. "The summary judgment process is not a summary trial." *Bird v. Valley Acre Farms, Inc.*, 177 N.E.3d 459, 467 (Ind. Ct. App. 2021). We consciously err on the side of letting marginal cases proceed to trial rather than risk short-circuiting meritorious claims. *Brown by Brown v. Southside Animal Shelter, Inc.*, 158 N.E.3d 401, 405 (Ind. Ct. App. 2020), *aff'd on reh'g*, 162 N.E.3d 1121 (Ind. Ct. App. 2021), *trans. denied*.

[9] The first step in interpreting a contract is to "review the contract as a whole, attempting to ascertain the parties' intent and making every attempt to construe the contract's language so as not to render any words, phrases, or terms ineffective or meaningless." *B&R Oil Co., Inc. v. Stoler*, 77 N.E.3d 823, 827 (Ind. Ct. App. 2017) (internal quotation marks omitted), *trans. denied*. However, in the instant case, the lease agreement is silent with respect to the procedure for modifying the agreement. While the agreement includes an incorporation clause, the effect of the incorporation clause is to guard against a party later claiming there was a prior or contemporaneous agreement that was not included in the written instrument. *See Hinkel v. Sataria Distrib. & Packaging,*

Inc., 920 N.E.2d 766, 769 (Ind. Ct. App. 2010) ("If the contract is completely integrated, constituting a final and complete expression of all the parties' agreements, then evidence of prior or contemporaneous written or oral statements and negotiations cannot operate to either add to or contradict the written contract."). "Parties may mutually modify contractual undertakings, and it is not always necessary to prove a written or oral modification of a contract because modification of a contract can be implied from the conduct of the parties." *Skweres v. Diamond Craft Co.*, 512 N.E.2d 217, 220-21 (Ind. Ct. App. 1987), *reh'g denied*. Even if a contract states any modification must be made in writing, the agreement may still be orally modified. *Id*.

[10] While DERR conceded at the hearing on Union City's motion for summary judgment that the June 27, 2019, email exchange between Orahood and Rozin does not in and of itself constitute an agreement to modify the lease agreement, DERR contends Union City assented to shortening the lease term through other communications and its conduct between June and December 2019. The June 27, 2019, email itself references a prior phone conversation, and in response to interrogatories, Rozin averred he received verbal confirmation from Orahood agreeing to early lease termination. Rozin further attested Orahood mentioned using the Property for his own business operations on numerous occasions and requested that DERR leave certain equipment at the Property. Orahood also asked to interview a DERR employee to discuss managing the Property after DERR vacated.

[11] Union City denies ever orally agreeing to shorten the lease term. In support thereof, Union City focuses on the June 27, 2019, email exchange. Union City argues:

> No reasonable interpretation of the June 27 e-mail would conclude that it amounted to an agreement to modify the Lease. The trial court's finding was well within the broad discretion provided it to interpret the evidence and weigh the facts. Accordingly, its decision to award summary judgment should be affirmed.

(Appellee's Br. at 10.) However, this argument misconstrues the appropriate standard of review. A court does not weigh evidence at summary judgment. Rather, it interprets all facts and makes all reasonable inferences in favor of the nonmovant. *Clem v. Watts*, 27 N.E.3d 789, 791 (Ind. Ct. App. 2015) ("On appeal, our task is the same as the trial court's. . . . We construe all facts and reasonable inferences in favor of the nonmoving party to ensure that it is not improperly denied its day in court.").

[12] Union City argues the June 27, 2019, email does not evidence an agreement to modify the lease term, but Rozin averred Union City orally agreed to the lease modification in communications outside the June 27, 2019, email exchange and through its conduct. Thus, a genuine issue of fact exists regarding whether DERR and Union City agreed to shorten the lease term. *See Ambrose v. Dalton Const., Inc.*, 44 N.E.3d 707, 712-13 (Ind. Ct. App. 2015) (holding genuine issue of material fact existed regarding whether homeowner orally asked construction company to change the location where the company intended to construct a

swimming pool on the homeowner's property), *clarified on reh'g*, 51 N.E.3d 320 (Ind. Ct. App. 2016), *trans. denied*.

[13] Alternatively, Union City argues whether the parties agreed to modify the length of the lease is not material because any such modification fails for lack of consideration. "The modification of a contract generally requires the same elements as a contract: offer, acceptance, and consideration." *Stardust Ventures, LLC v. Roberts*, 65 N.E.3d 1122, 1127 n.3 (Ind. Ct. App. 2016). As our Indiana Supreme Court has explained:

> To constitute consideration, there must be a benefit accruing to the promisor or a detriment to the promisee. A benefit is a legal right given to the promisor to which the promisor would not otherwise be entitled. A detriment on the other hand is a legal right the promisee has forborne. The doing of an act by one at the request of another which may be a detrimental inconvenience, however slight, to the party doing it or may be a benefit, however slight, to the party at whose request it is performed, is legal consideration for a promise by such requesting party.

Ind. Dept. of State Revenue v. Belterra Resort Indiana, LLC, 935 N.E.2d 174, 179 (Ind. 2010) (internal quotation marks and citations omitted), *aff'd in relevant part on reh'g*, 942 N.E.2d 796 (Ind. 2011).

[14] "A lease is construed in the same manner as any other contract." *Smyrniotis v. Marshall*, 744 N.E.2d 532, 534 (Ind. Ct. App. 2001) (internal quotation marks and brackets omitted). Generally, in a lease of real property, the owner of the property divests himself of the possession and use of his property, in favor of the

lessee, upon a valid consideration, usually rent, and for a definite term. *Id*. at 535 n.1. Likewise, if the lessor and lessee subsequently decide to shorten the term of a lease agreement, the lessor receives possession and use of his property earlier than he otherwise would have and the lessee is not required to make the number of lease payments he was otherwise required to make. Thus, assuming DERR and Union City agreed to shorten the term of the lease agreement, such a contract modification does not fail for lack of consideration, and therefore, whether the lease agreement was modified is a material fact.[1] *See Ind. Bureau of Motor Vehicles v. Ash, Inc.*, 895 N.E.2d 359, 366 (Ind. Ct. App. 2008) (holding fax in which lessee agreed to waive clause requiring 60-day notice before termination in exchange for lessor making improvements to the property constituted a valid contract modification), *reh'g denied*.

Conclusion

[15] A genuine issue of material fact exists regarding whether Union City and DERR agreed to modify their lease agreement to shorten the lease term. This fact is material because if the parties did agree to shorten the lease term, it amounts to a legal contract. Therefore, we reverse the trial court's denial of

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[1] DERR also argues genuine issues of material fact remain regarding the amount of damages Union City incurred as a result of DERR's alleged breach. However, we need not to address that argument because we reverse the trial court's order granting summary judgment on other grounds and remand the matter for further proceedings. *See Frito-Lay, Inc. v. Cloud*, 569 N.E.2d 983, 989 (Ind. Ct. App. 1991) (remanding for new trial on both liability and damages after finding error concerning trial court's judgment on the issue of liability).

DERR's motion to correct error and its grant of summary judgment to Union City, and we remand for further proceedings consistent with this opinion.

[16] Reversed and remanded.

Riley, J., and Tavitas, J., concur.