MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jo Ann Lance,
Appellant-Defendant,

v.

Mark A. Lance,
Appellee-Plaintiff

July 26, 2022

Court of Appeals Case No. 21A-PL-2872

Appeal from the Warrick Superior Court

The Honorable Amy Steinkamp-Miskimen, Judge

Trial Court Cause No. 87D02-2001-PL-112

Crone, Judge.

Case Summary

[1] Mark Lance (Nephew) sued Jo Ann Lance (Aunt) seeking specific performance of a purported oral agreement between Aunt and Nephew for the sale of 2.5 acres of Aunt's vacant farmland. Following a trial, the trial court entered findings of fact, conclusions thereon, and judgment in favor of Nephew and ordered Aunt to execute and deliver a general warranty deed for the land to Nephew, and also ordered Aunt to pay Nephew's attorney's fees. Aunt now appeals, arguing that the trial court erred in denying her motion to dismiss and motion for summary judgment and that the trial court's findings of fact and conclusions thereon are unsupported by the evidence and clearly erroneous. Specifically, she argues that the Statute of Frauds precludes Nephew's claim. We agree and therefore reverse.

Facts and Procedural History

[2] Aunt is Nephew's elderly, widowed aunt who was married to Nephew's uncle, Paul Lance. Several times over the years prior to 2019, Aunt and Nephew had discussions regarding Aunt's 13.4 acres of vacant farmland in Warrick County, to which her residence is adjacent. The land had been owned by different members of the Lance family for more than fifty years. Nephew was interested in building a home on a portion of the land because, along with Aunt, his aging father also lived in a residence adjacent to the land. Toward the end of 2018, Aunt approached Nephew about whether he would be interested in purchasing the 13.4 acres. On or about April 19, 2019, Aunt and Nephew entered into an oral agreement that Aunt would sell, and Nephew would purchase, 2.5 acres of

Aunt's land. The location of the 2.5 acres agreed upon was not exact but was merely approximate. The trial court found that the essential terms of the oral agreement included:

> a. SUBJECT REAL ESTATE was and is 2 ½ acres lying along Decker Road in the northwest corner of [Aunt's] real estate as staked with approximate corner markings by [Nephew] of which [Aunt] was aware, with precise legal description to be determined by the survey.
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> b. Purchase price: $18,000.00 to be paid when surveying work completed and closing could be scheduled.
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> c. Surveying costs to be paid by [Nephew].
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> d. Notification of agreement to tenant farmer by [Nephew].
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> e. Deed and document preparation to be at the cost of [Nephew].
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> f. A partial payment of the purchase price of $1,000.00 to be paid by [Nephew].

Findings of Fact at 1-2. Aunt gave Nephew a written receipt that she signed and dated April 19, 2019, that indicated that Nephew paid Aunt $1,000 for the "sale of 2 ½ ac[res]." Ex. Vol. 5 at 62 (Plaintiff's Ex. 7). There was no description, legal or otherwise, identifying the land referenced on the receipt, no reference to the total purchase price for the land, and no reference to a closing date for the purported sale transaction.

[3] Sometime thereafter, with Aunt's permission, Nephew informed Aunt's tenant farmer, Kevin Mosbey, that 2.5 acres of the 13.4 acres could not be farmed

starting with the 2019 crop year. Nephew roughly marked the corners of the purported 2.5 acres with stakes. He then, again with Aunt's knowledge and permission, contacted a survey company to survey the property and to prepare the necessary documentation in order to complete parcelization of Aunt's land in compliance with Warrick County ordinances. Once the survey company completed the survey, a parcelization application was filed and subsequently approved and recorded with the Warrick County Recorder in early August 2019. In the meantime, Nephew had a soil survey conducted of the 2.5 acres, at the cost of $300, to determine its suitability for a septic tank permit, which is one of the prerequisites to obtaining a building permit.

[4] At some point Nephew telephoned Aunt to inform her that he was ready to move forward with obtaining financing and pay her the remaining $17,000 of the purchase price; however, she indicated that she would no longer be selling him the 2.5 acres. In late August 2019, Aunt sent Nephew a formal letter terminating any oral agreement the parties had with regard to the land. She informed Nephew that while her letter represented the termination of the parties' "dealings in regard to this land," that Nephew should let her know if "in the future, you want to discuss the purchase of the entire 13[.4] acres." *Id*. at 69 (Plaintiff's Ex. 11). Included with the termination letter was a check for $2,000 to "reimburse" Nephew for the $1,000 payment given "as a hold" on the land, and an additional $1000 as "a good faith payment for costs" incurred by Nephew "on said land." *Id*.

[5] On January 27, 2020, Nephew filed a complaint against Aunt seeking specific performance, or, in the alternative, damages as a result of the alleged breach of the agreement between Aunt and Nephew for the sale of 2.5 acres of her land. Nephew also requested attorney's fees. On February 12, 2020, Aunt filed a motion to dismiss asserting that Nephew's claim was barred by the Statute of Frauds, Indiana Code Section 32-21-1-1(b)(4). The trial court denied Aunt's motion. Thereafter, Aunt filed her answer and counterclaim for slander of title. In July 2021, Aunt filed a motion for summary judgment again asserting that Nephew's claim was barred by the Statute of Frauds. Following a hearing, the trial court denied the motion.

[6] A bench trial was held in September 2021. On December 1, 2021, the trial court issued its findings of fact, conclusions thereon, and judgment in favor of Nephew. Specifically, the trial court ordered Aunt to execute and deliver to Nephew a general warranty deed to 2.5 acres of her land in accordance with the legal description determined by the survey and filed with the Warrick County Recorder, while at the same time Nephew would pay Aunt $17,000 representing the balance of the purchase price. The court further entered judgment against Aunt for $13,952.11 for Nephew's attorney's fees and expenses incurred "in the bringing of this cause and defense of the counterclaim[.]" Judgment at 7. This appeal ensued.

Discussion and Decision

[7] Aunt raises numerous issues on appeal involving the trial court's pretrial, trial, and posttrial rulings. Because these rulings culminated in the trial court's

ultimate decision to grant specific performance to Nephew of the parties' purported oral agreement for the sale of land, the sole dispositive issue on appeal is whether the Statute of Frauds renders the agreement unenforceable and the trial court's resulting order of specific performance and award of attorney's fees clearly erroneous. We conclude that it does.

[8] The trial court here entered findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A).[1] We thus apply a two-tiered review, and affirm when the evidence supports the findings, and when the findings support the judgment. *Wysocki v. Johnson*, 18 N.E.3d 600, 603 (Ind. 2014). We will not set aside the findings or judgment unless they are clearly erroneous, and we must give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Id*. (citing Ind. Trial Rule 52(A)). Findings of fact are clearly erroneous when they have no factual support in the record, and a "judgment is clearly erroneous if it applies the wrong legal standard to properly found facts[.]" *Id*. at 603-04 (citation omitted).

[9] As a general matter, the decision whether to grant specific performance is a matter within the trial court's sound discretion. *Stainbrook v. Low*, 842 N.E.2d

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[1] In her statement of the case, Aunt indicates that both parties submitted proposed findings of fact and conclusions thereon and that the trial court adopted verbatim the proposed findings and separate judgment prepared by Nephew. Nephew's proposed findings and judgment are not included in the appendices, but Nephew concedes that he "generally agrees" with Aunt's statement of the case. Appellee's Br. at 6. We note that while the wholesale adoption of one party's proposed findings is not prohibited, we have recognized that the practice tends to weaken our confidence as an appellate court that the trial court's findings and conclusions are the result of its considered judgment. *Chubb Custom Ins. Co. v. Standard Fusee Corp.*, 2 N.E.3d 752, 758 n.2 (Ind. Ct. App. 2014).

386, 394 (Ind. Ct. App. 2006), *trans. denied*. Specific performance is a matter of course when it involves contracts to purchase real estate. *Id*. However, the Statute of Frauds, Indiana Code Section 32-21-1-1(b), states in pertinent part that

> [a] person may not bring any of the following actions unless the promise, contract, or agreement on which the action is based, or a memorandum or note describing the promise, contract, or agreement on which the action is based, is in writing and signed by the party against whom the action is brought or by the party's authorized agent:
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> …
>
> (4) An action involving any contract for the sale of land.

In other words, the Statute of Frauds requires that contracts for the sale of real property be in writing. *Fox Dev., Inc. v. England*, 837 N.E.2d 161, 165 (Ind. Ct. App. 2005). "The statute is intended to preclude fraudulent claims that would probably arise when one person's word is pitted against another's and that would open wide the flood-gates of litigation." *Id*. at 166. It is well settled that the Statute of Frauds "does not govern the formation of a contract but only the *enforceability* of contracts that have been formed." *Id*. at 165 (emphasis added). Stated another way, oral contracts for the conveyance of land are not void, but voidable, and thus the statute affects only the enforceability of contracts that have not yet been performed. *Stephens v. Tabscott*, 159 N.E.3d 634, 639 (Ind. Ct. App. 2020).

[10] For ease of discussion, and in light of the evidence supporting the trial court's findings and conclusions on this issue, we begin with the premise that Nephew and Aunt indeed entered into an oral contract for Aunt to sell Nephew 2.5 acres of her 13.4-acre parcel of land for $18,000, with precise legal description to be determined by a subsequent survey.[2] Even assuming this to be true, the trial court misunderstood the Statute of Frauds in determining that the mere proof of the existence of such verbal agreement somehow "dictates a relaxation of the rigid enforcement of the writing requirement of the Statute of Frauds." Findings of Fact at 9. While the trial court appears to have attached much significance to the existence of the bare bones written receipt given to Nephew by Aunt, the fact remains that there is no writing signed by these parties memorializing their agreement that even comes close to satisfying the Statute of Frauds. Indiana law is clear that the writing must state "with reasonable certainty each party and the land; and ... the terms and conditions of the promises and by whom the promises were made." *Fox v. Barker*, 170 N.E.3d 662, 667 (Ind. Ct. App. 2021) (citation omitted). There is no such writing here, and any contrary finding or conclusion by the trial court is clearly erroneous.

[11] Nephew attempts to circumvent the Statute of Frauds' writing requirement by asserting part performance, an equity doctrine intended to prevent a party that

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[2] As noted above, for the purposes of this appeal, we will presume that an oral contract for Nephew to purchase Aunt's land existed. That is to say, there was an offer, acceptance, consideration, and a meeting of the minds on all essential elements or terms of the agreement. *See Jernas v. Gumz*, 53 N.E.3d 434, 445 (Ind. Ct. App. 2016) (basic requirements for contract are offer, acceptance, consideration, and meeting of the minds on essential elements), *trans. denied*.

breaches an oral contract from using the Statute of Frauds "to get off scot-free." *Id.* at 668 (citing *Coca-Cola Co. v. Babyback's Intern., Inc.*, 841 N.E.2d 557, 566 (Ind. 2006)). Indeed, oral contracts for the sale of land "may be enforced by a court of equity under the doctrine of part performance." *Stephens*, 159 N.E.3d at 639 (quoting *Summerlot v. Summerlot*, 408 N.E.2d 820, 828 (Ind. Ct. App. 1980)). That doctrine provides that "[w]here one party to an oral contract in reliance on that contract has performed his part of the agreement to such an extent that repudiation of the contract would lead to an unjust or fraudulent result, equity will disregard the requirement of a writing and enforce the oral agreement." *Id*. Payment, possession, and valuable improvement on the land, or "some combination" thereof, can be cited as acts of performance that form the basis for applying the doctrine of part performance. *Spring Hill Devs., Inc. v. Arthur*, 879 N.E.2d 1095, 1104-05 (Ind. Ct. App. 2008).

[12] Again, contrary to the trial court's findings, Nephew has not presented sufficient evidence to establish any of these acts, much less a combination thereof. First, Nephew's payment to Aunt of $1,000, which represents less than six percent of the total purchase price for the land, and which has since been returned to him by Aunt, constitutes a de minimis fulfillment of his contractual obligations at best. As for possession, it is undisputed that Nephew has never possessed the land. While the trial court found that Nephew "took control" of the property by "halting the crop production" on the property so he could get a survey completed, *see* Findings of Fact at 10, control (even assuming that merely contacting the tenant farmer is an act of control) is not possession.

Finally, there is no evidence that Nephew made any valuable improvements to the land. The record simply does not support the trial court's finding that Nephew's submission and approval of a parcelization plan to local authorities and his act of obtaining a professional soil analysis improved the value of the property in any meaningful way.

[13] Moreover, even when those acts do not bring the doctrine of part performance into play, an alternative way to determine whether the doctrine applies is to consider whether the party seeking enforcement, in reasonable reliance on the contract, "so changed his position that injustice can be avoided only by specific enforcement." *Spring Hill Devs.,* 879 N.E.2d at 1105 (quoting Restatement (Second) of Contracts § 129). There is no evidence here that Nephew has so changed his position that injustice can be avoided only by specific enforcement of the oral contract. Indeed, it is well settled that where restitution would be adequate to prevent injustice, specific performance is not necessary. *Fox*, 170 N.E.3d at 668. Because Nephew did not establish that injustice can be avoided only through specific performance, as opposed to restitution, it follows that the part performance doctrine does not apply to remove the parties' oral agreement from the Statute of Frauds.[3]

[3] While the trial court also concluded that the Statute of Frauds' writing requirement should be "relaxed or excused" on the basis of "promissory estoppel," *see* Findings of Fact at 12, the court only mentioned the legal standard and made no specific findings on this issue. Accordingly, we do not address it.

[14] In short, the parties' agreement for the sale of Aunt's land is unenforceable. Therefore, the trial court's order of specific performance is clearly erroneous, and we reverse it.[4] We similarly reverse the trial court's order that Aunt pay Nephew's attorney's fees. The general rule in Indiana, known as the American Rule, "is that each party pays its own attorney's fees; and a party has no right to recover them from the opposition unless it first shows they are authorized." *River Ridge Dev. Auth. v. Outfront Media, LLC*, 146 N.E.3d 906, 912 (Ind. 2020). The trial court here relied upon the "obdurate behavior exception" to the American Rule, which permits a court, in certain circumstances, to award attorney's fees to a "prevailing party." *Id*.[5] Nephew is not, and never should have been, a prevailing party in this case, and an award of fees to him is unwarranted.

[15] In sum, the trial court's order of specific performance and its award of attorney's fees are reversed, and we remand to the trial court for further

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[4] We note that the trial court also entered judgment against Aunt on her counterclaim for slander of title. She does not address that portion of the judgment in her briefs on appeal, so neither do we.

[5] There is both a common-law obdurate behavior exception as well as the General Recovery Rule, Indiana Code Section 34-52-1-1, that permit an award of attorney's fees "to the prevailing party" based on another party's actions during litigation. The common law exception applies when a party knowingly files or fails to dismiss a "baseless claim" and a trial court finds the conduct "vexatious and oppressive in the extreme and a blatant abuse of the judicial process." *River Ridge Dev.*, 146 N.E.3d at 913. The General Recovery Rule allows a court "[i]n any civil action" to award attorney's fees "as part of the cost to the prevailing party" if another party "(1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless; (2) continued to litigate the action or defense after the party's claim or defense became frivolous, unreasonable, or groundless; or (3) litigated the action in bad faith." Ind. Code § 34-52-1-1(b). Neither exception applies here.

proceedings to address the minimal restitution, if any at all, due to Nephew to prevent injustice as a result of the unenforceable oral agreement.[6]

[16] Reversed and remanded.

Vaidik, J., and Altice, J., concur.

[6] The record indicates that Aunt returned the $1000 payment Nephew made to her on April 19, 2019, and further reimbursed him for $1000 worth of expenses and she should be credited for the same.