MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Brian Foxworthy,
Appellant-Plaintiff,

v.

3 Crown Capital, LLC, et al.,
Appellees-Defendants.

March 17, 2021

Court of Appeals Case No. 20A-PL-1572

Appeal from the Floyd Superior Court

The Honorable Carrie K. Stiller, Judge

Trial Court Cause No. 22D01-1905-PL-776

Altice, Judge.

Case Summary

[1] Brian Foxworthy brings this interlocutory appeal, claiming that the trial court erred in denying his motion for summary judgment in his action against 3 Crown Capital LLC (3 Crown). Foxworthy contends that an assignment agreement (the Assignment) the parties executed entitled him to a $365,000 payment as a matter of law. Foxworthy also argues that the trial court erred in denying his petition for pre-judgment attorney's fees and requests an award of appellate attorney's fees.

[2] We affirm the denial of Foxworthy's motion for summary judgment and his petition for attorney's fees, deny his request for appellate attorney's fees, and remand this cause to the trial court for further proceedings consistent with this opinion.

Facts and Procedural History

[3] 3 Crown was formed in Indiana on January 1, 2016 by Will Dierking, Vitor Bueno, and Foxworthy, as a private equity firm.[1] Each member initially

[1] 3 Crown is the parent company and sole owner of subsidiary/affiliate-appellees, Talon Logistics Dedicated, LLC, Talon Logistics Services, LLC, Talon Logistics, LLC, Claw Holdings, LLC, Trident Equipment, LLC, and TSI Construction, Inc. For purposes of this opinion, the appellees are collectively referred to as 3 Crown because the issues before us do not turn on the individual entities.

contributed $166,666.66 to fund 3 Crown, along with notes of several companies owned by another individual. In September 2016, each member contributed an additional $35,556, for a total individual capital contribution of $202,222.66.

[4] While operating as 3 Crown, each member received an annual salary of $110,000. The members did not take profit draws or other distributions beyond that of tax distributions in accordance with the company's operating agreement. Pursuant to that agreement, profit and loss amounts on an annual basis were allocated—but not paid—based on ownership percentage. Those allocations were the basis of the distributions paid annually to each member to cover any taxes owed on 3 Crown's profits. In other words, 3 Crown determined the amount of the distributions under the operating agreement and, if necessary, distributed those amounts to each member in the first quarter following the end of the tax year. Foxworthy was a 20% owner of 3 Crown as of 2017, as he had reduced his ownership share from 33% to 20% following the company's call for capital and his decision not to inject additional funds.

[5] Sometime in 2017, Foxworthy told Bueno that he wanted to leave 3 Crown. Over the next several months, Foxworthy, Dierking, and Bueno negotiated the terms of a severance agreement and assignment. On March 16, 2018, Dierking sent an email to Foxworthy, proposing a $100,000 payment at closing or $150,000 that would be paid out over six quarters. On April 18, 2018, Foxworthy made a counter demand that he forwarded to John Craft—the accountant who worked for 3 Crown—for analysis and comment.

[6] Craft explained to Foxworthy that certain losses could be recognized only if 3 Crown would assign profits to him. Craft understood that Foxworthy wanted to minimize his capital gains and maximize any past losses by ensuring a profit allocation. As a result of that conversation, Foxworthy sought $270,000 to sell his interest in 3 Crown. Thereafter, Craft assisted 3 Crown and Foxworthy in preparing calculations for the profit allocation that Foxworthy would need to satisfy his buyout demand. At some point, the structure of the severance switched from a pure buyout of Foxworthy's interest in 3 Crown to a buyout that would provide Foxworthy the amount he sought in cash. The structure of this new arrangement afforded 3 Crown some tax deductions.

[7] On December 8, 2018, Dierking sent a proposed breakdown of the allocation, distribution, and severance payment to Foxworthy. The proposal included a severance payment of $250,000 with a net after tax amount of $143,351.93, and an allocation of profits in the amount of $399,727, for a total tax distribution of $140,704. Foxworthy rejected that offer, and on December 13, 2018, Foxworthy emailed Dierking stating that he would agree to a profit allocation with a tax distribution payment of $125,994, $1.00 for his 3 Crown stock, and a gross severance payment of $330,000. Five days later, Foxworthy informed 3 Crown that his "best and final" demand was a severance payment of $335,600, a gross allocation of profits of $365,000, and $1.00 for his 3 Crown stock. *Appendix Vol. III* at 98-100.

[8] Based on these terms, the parties began drafting a severance agreement and

[9] the Assignment. Counsel for each party substantially revised and edited the documents over the next several months. The parties executed the severance agreement and the Assignment on April 10, 2019.[2] In relevant part, the Assignment provided that:

TERMS AND CONDITIONS

> 2. Assignment. Assignor does hereby assign . . .[and] transfer . . . unto Assignee all right, title and interest in and to the LLC Interest and including . . . all rights associated therewith . . . and any and all future rights to distributions of any kind pursuant to the Operating Agreement together with any rights . . . Assignor has . . . in . . . any of the assets or properties of Assignee . . . for the following consideration, which *shall be paid by Assignee to Assignor* via bank wire:
>
> (a) allocated 2018 Calendar Year Profits as reported on the 2018 K-1 *in the amount of $365,000.00 along with the estimated associated tax distribution* which will be funded at closing following execution of all required Agreements and documentation by Assignor. *For the avoidance of doubt, the tax distribution payment amount as noted above, and associated with the Assignor's 2018 estimated net taxable profit shall be $129,064.00, calculated as (1) the allocated 2018 estimated Calendar Year Profits of $365,000.00, reduced by (2) the Assignor's proportionate share of the Assignee's estimated Section 199A deduction of $73,000, to determine the estimated Net Taxable Profit of $292,000.00 and (3) then multiplied by 44.20% (the*

[2] The terms of the severance agreement have been fully satisfied and are not at issue.

> *distributable tax rate for 2018).* Furthermore, Assignee agrees to make an Additional Distribution for the Assignor's share of any additional federal, state, local or other taxes, which may come due at a later date for the 2018 tax year as long as such additional tax was only due to Assignee's operations and not due to Assignor's individual tax position. This Additional Distribution would also include reasonable accounting and legal fees for the cost of determining and satisfying the same, and any penalty and interest charges accrued solely due to Assignor's 2018 tax year;
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> (b) purchase price of $1.00 . . . .

Appendix Vol. II at 56-57 (emphases added).

[10] The Assignment also included the following integration clause:

> **Whole Agreement.** The Parties further agree that this Assignment . . . set[s] forth the entire agreement between the Parties hereto and fully supersedes any and all prior agreements or understandings between them with respect to the terms . . . set forth in such agreements. This Assignment may be amended or superseded only by a subsequent writing, executed by all Parties.

Id. at 61.

[11] Finally, the Assignment set forth the following indemnification provisions with regard to expenses and attorney's fees:

> 9. Indemnity by Assignee. *Assignee shall indemnify Assignor from any damages, liability or expense (including reasonable attorney's fees) resulting to Assignor*, either directly or indirectly, from (a) any material inaccuracy in any representation or warranty, or (b) any breach of any covenant or agreement contained in this Assignment or the Company Documents. Assignee shall

> indemnify, defend and *hold harmless Assignor against all losses, liabilities, costs, attorney's fees and expenses, incurred by Assignor including all costs, expenses, other claims and causes of action accrued or arising with respect to the ownership and operation of the businesses for the entirety of the Assignor's involvement in the Assignee's business . . .* except to the extent that any of the foregoing are the result of Assignor's fraud, intentional acts, willful misconduct, or gross negligence. . . .
>
> 10. Notwithstanding anything contained in this Assignment or any of the other Agreements to the contrary, it is expressly understood and agreed that *in no event shall the Assignor be liable or responsible for any Damages (whether via an indemnification claim hereunder or otherwise) or other obligations, including the costs of legal fees, for the enforcement of this Assignment and liabilities that arise from or are related in any manner to any potential or real personal liabilities arising from the employment or ownership of Assignee by Assignor . . .* except to the extent that any of the foregoing are the result of Assignor's fraud, intentional acts, willful misconduct, or gross negligence.

Id. at 60 (emphases added).

[12] On April 11, 2019, Foxworthy received a tax distribution from 3 Crown in the amount of $129,064 via bank wire. Then, on April 17, 3 Crown wired $191,347.85 to Foxworthy in satisfaction of the severance agreement, along with a hand-delivered $1.00 check for the stock purchase.

[13] On April 18, 2019, Foxworthy emailed Dierking inquiring as to when he would receive the "profit distribution" from 3 Crown. *Appellant's Appendix Vol. III* at 9. Foxworthy claimed that the amount he received was $365,000 less than what the Assignment contemplated. 3 Crown responded that Foxworthy was paid

what he had demanded: a severance of $335,600 resulting in an after-tax payment of $191,347.85, a gross allocation of profits of $365,000 that resulted in a tax distribution payment of $129,064, and $1 for stock.

[14] On May 23, 2019, Foxworthy filed a complaint against 3 Crown, claiming that it breached the Assignment by failing to pay him the additional $365,000. 3 Crown denied the allegations, and Foxworthy subsequently moved for summary judgment, along with a motion for pre-judgment attorney's fees in the amount of $52,276.25.

[15] 3 Crown's response asserted that in accordance with the Assignment, Foxworthy was entitled only to a distribution based on the total allocated 2018 profits in the amount of $129,064. In the alternative, 3 Crown maintained that the Assignment was ambiguous.[3] 3 Crown also claimed that Foxworthy's request for attorney's fees was premature because the trial court had not made any finding as to whether 3 Crown had breached the Assignment and no final judgment had been entered in the case.

[16] Following a hearing on June 12, 2020, the trial court summarily denied all pending motions. Pursuant to Foxworthy's motion, the trial court certified the order for interlocutory appeal. Foxworthy has also made a request for appellate attorney's fees, claiming that the indemnity provisions in the Assignment

[3] 3 Crown did not file a cross-motion for summary judgment.

entitled him to those fees. We accepted jurisdiction on September 17, 2020, and this appeal ensued.

Discussion and Decision

I. Standard of Review

[17] Our standard of review on summary judgment is well settled:

> The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Reed v. Reid,* 980 N.E.2d 277, 285 (Ind. 2012). Once these two requirements are met by the moving party, the burden then shifts to the non-moving party to show the existence of a genuine issue by setting forth specifically designated facts. *Id.* Any doubt as to any facts or inferences to be drawn therefrom must be resolved in favor of the non-moving party. *Id.* Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows there is no genuine issue of material fact and that the moving party deserves judgment as a matter of law.

A House Mechanics, Inc. v. Massey, 124 N.E.3d 1257, 1262 (Ind. Ct. App. 2019) (quoting *Goodwin v. Yeakle's Sports Bar and Grill, Inc.,* 62 N.E.3d 384, 386 (Ind. 2016)). Additionally, this court will affirm the denial of summary judgment if it is sustainable on any legal theory or basis found in the evidentiary matter designated to the trial court. *GEICO Ins. Co. v. Rowell,* 705 N.E.2d 476, 480 (Ind. Ct. App. 1999).

II. Foxworthy's Claims

A. Breach of the Assignment

[18] Foxworthy contends that the trial court erred in denying his motion for summary judgment. Specifically, he contends that as a matter of law the Assignment unambiguously required 3 Crown to pay him an additional $365,000.

[19] We initially observe that the construction of a written contract is generally a question of law for the court. *Midwestern Indem. Co. v. Leffler Constr. Co.,* 463 N.E.2d 1130, 1133 (Ind. Ct. App. 1984). When interpreting a contract, "the court should accept an interpretation of the contract that harmonizes its provisions." *City of Washington v. Daviess Cty. Rural Water Sys., Inc.,* 91 N.E.3d 585, 595 (Ind. Ct. App. 2017), *trans. denied*. To that end, this court will make all attempts to construe the language in a contract so as not to render any words, phrases, or terms ineffective or meaningless. *Bicknell Minerals, Inc. v. Tilly,* 570 N.E.2d 1307, 1316 (Ind. Ct. App. 1991), *trans. denied.* Specific words and phrases cannot be read exclusive of other contractual provisions. *Bloomfield Bank v. United Fidelity Bank F.S.B.*, 113 N.E.3d 708, 727 (Ind. Ct. App. 2018), *trans. denied*. Additionally, courts presume that all provisions in a contract are there for a purpose and, if possible, try to give effect to all provisions. *George S. May Intern. Co. v. King,* 629 N.E.2d 257, 261 (Ind. Ct. App. 1994), *trans. denied.* The goal in contract interpretation is "to determine the intent of the parties at the time that they made the agreement." *Care Grp. Heart Hosp., LLC v. Sawyer*, 93 N.E.3d 745, 752 (Ind. 2018).

[20] When reviewing a contractual dispute, courts start with the contract's language to determine whether it is ambiguous. *Ryan v. TCI Architects/Eng'rs/Contractors, Inc.,* 72 N.E.3d 908, 914 (Ind. 2017). If the language is unambiguous, the terms and provisions are given their plain and ordinary meaning in view of the whole contract, without substitution or addition. *State v. Int'l Bus. Machs. Corp.,* 51 N.E.3d 150, 160 (Ind. 2016). Also, the parties' intent is to be determined by reviewing the language contained within the "four corners" of the document, and "parol or extrinsic evidence is [generally] inadmissible to expand, vary, or explain the [terms]." *Performance Serv's., Inc. v. Hanover Ins. Co.,* 85 N.E.3d 655, 660 (Ind. Ct. App. 2017).

[21] On the other hand, if the terms of a written contract are ambiguous, it is the responsibility of the trier of fact to ascertain the facts necessary to construe the contract. *Midwestern Indem.,* 463 N.E.2d at 1133. A contract is ambiguous if a reasonable person would find the contract subject to more than one interpretation. *Citimortgage, Inc. v. Barabas,* 975 N.E.2d 805, 813 (Ind. 2012). To that end, if the language is ambiguous, the court may properly consider relevant and extrinsic evidence to resolve the ambiguity. *In re Indiana State Fair Litig.,* 49 N.E.3d 545, 548 (Ind. 2016).

[22] In this case, Foxworthy focuses on the language in the Assignment stating that he would assign his rights in 3 Crown in exchange "for the following consideration, which *shall be paid by Assignee to Assignor* via bank wire: (a) allocated 2018 Calendar Year Profits . . . in the amount of $365,000 *along with* the estimated associated tax distribution. . . ." *Appendix Vol. II* at 56-57

(emphases added). Foxworthy maintains that the phrase "along with" that follows the amount of $365,000 should be read as "in addition to" the other amounts specified in the remainder of that paragraph. *See Appellant's Brief* at 15, 20. Foxworthy argues that if the initial phrase in the Assignment meant something other than the payment of money, it would not have provided for payment to be made via bank wire. If it were otherwise intended, says Foxworthy, placement of the bank wire phrase would have been irrelevant, and the method of payment would have been included after the stated tax distribution amount of $129,064. Thus, if paragraph 2(a) was intended *only* to provide for a payment of $129,064, the first part of the sentence would be unnecessary. As a result, Foxworthy contends that his bargained-for benefit under the Assignment necessarily included payments of $365,000 in profits, $129,064 in tax distributions, and $1 for the purchase of the stock.

[23] 3 Crown, however, suggests that paragraph 2—when read in its entirety—sets forth: (a) the general basis and time for payment; (b) a specific figure; and (c) how contingencies related to further tax liabilities were to be resolved. Hence, notwithstanding Foxworthy's assertions and his sole focus on the isolated terms of "along with" in the Assignment, 3 Crown maintains that it is reasonable to construe the first sentence of paragraph 2 that the allocated 2018 profits would be taken "along with" the tax associated with those profits to arrive at the total amount that would be distributed to Foxworthy. 3 Crown asserts that the next sentence of that paragraph confirms that interpretation because it details the calculation of the distribution payment by mathematically associating the taxes

along with the 2018 profits. Therefore, when associating the numbers "along with" each other—and performing the calculations set forth in the Assignment—the resulting amount is the $129,064 that was paid to Foxworthy.

[24] Upon our review of the four corners of the Assignment, we conclude that it is unclear whether it was intended that Foxworthy would receive both the profits and a tax distribution. In other words, Foxworthy's proposed interpretation—with a hyper focus on a single phrase—is not the only reasonable interpretation of the contractual language. Thus, an ambiguity exists because a "reasonable person would find the contract subject to more than one interpretation." *Citimortgage,* 975 N.E.2d at 813.

[25] The designated evidence established that throughout the negotiations, Foxworthy consulted with an accountant, hoping to minimize capital gains resulting from the sale of his interest and maximize past loses by ensuring an allocation of 3 Crown's profits to him. Dierking sent a proposed breakdown of the allocation, distribution, and severance payment to Foxworthy on December 8, 2018 that showed a severance payment of $250,000 with a net after tax amount of $143,351.93, and an allocation of income of $399,727 for a tax distribution of $140,704.

[26] Foxworthy rejected that offer, countered, and stated that his "net after tax number is around $230k which is the return of my capital and catch-up compensation for my having been employed for 4 months. . . ." *Appendix Vol. III* at 32-34. Thereafter, on December 13, 2018, Foxworthy contacted Dierking,

stating his agreement to the income allocation with a tax distribution payment of $125,994, sale of stock for $1 and a gross severance payment of $330,000. Foxworthy reiterated his "best and final" demand in an email to Dierking five days later, where he demanded a gross allocation of profits in the amount of $365,000, and $1 for stock. *Appendix Vol. III* at 98-100.

[27] Negotiations continued where it was determined that Foxworthy was to receive a severance of $335,600 resulting in an after-tax payment of $191,347.85, a gross allocation of profits of $365,000 resulting in a tax distribution payment of $129,064, and $1 for stock. On April 10, 2019, the agreements were executed, and the following day 3 Crown wired Foxworthy a tax distribution in the amount of $129,064. On April 17, 2019, 3 Crown wired $191,347.85 in severance to Foxworthy, and a check for the $1 stock payment was subsequently hand delivered to Foxworthy.

[28] The above demonstrates that Foxworthy has failed to show that he was entitled to an additional payment of $365,000 from 3 Crown as a matter of law because of the ambiguity and conflicting reasonable interpretations of the Assignment. Thus, a genuine issue of material fact remains as to the amount that Foxworthy agreed to be paid, and the trial court properly denied the motion for summary judgment.

B. Attorney's Fees

[29] Foxworthy maintains that the trial court erred in denying his request for attorney's fees. Specifically, Foxworthy claims that he is entitled to recover

those fees under the indemnity provisions of the Assignment because 3 Crown breached its agreement to pay him the additional amount of $365,000. Foxworthy also argues that he is entitled to an award of appellate attorney's fees because 3 Crown's actions "forced" him to bring this interlocutory appeal. *Appellant's Brief* at 30.

[30] Parties to litigation generally pay their own attorney fees, but they may agree by contract to do otherwise. *Reuille v. E.E. Brandenberger Const., Inc.*, 888 N.E.2d 770, 771 (Ind. 2008). When parties have executed a contractual provision agreeing to pay attorney fees, the agreement is enforceable according to its terms unless the contract is contrary to law or public policy. *Id.*

[31] In support of his claim for attorney's fees, Foxworthy directs us to the language in the indemnification provision of the Assignment that provides "in no event shall [Foxworthy] be liable or responsible for any Damages (whether via indemnification or otherwise) or other obligations, including the costs of legal fees, for the enforcement of this Assignment . . . ." *Appendix Vol. II* at 60. Foxworthy also relies on another provision in the Assignment that indemnifies him "from any damages, liability or expense (including reasonable attorney's fees) resulting to [Foxworthy], either directly or indirectly, from (a) any material inaccuracy in any representation or warranty, or (b) *any breach of any covenant or agreement contained in this Assignment* or the Company Documents. . . ." *Id.* (Emphasis added).

[32] Foxworthy's argument is misplaced, in that the trial court had not entered a judgment when Foxworthy requested payment of his legal fees, and it was uncertain whether Foxworthy would prevail in the action. To be sure, the ordinary meaning" of a *prevailing party* in an action "contemplate[s] . . . [the] entry of a favorable judgment. . . ." *Reuille,* 888 N.E.2d at 771-72 (citing Black's Law Dictionary 1188 (6th ed. 1990) (emphasis added). Generally, if a party does not receive a favorable judgment "then it is not a prevailing party." *River Ridge Dev. Authority v. Outfront Media, LLC,* 146 N.E.3d 906, 913 (Ind. 2020).[4] Because we have affirmed the trial court's denial of the motion for summary judgment, Foxworthy has not prevailed and, therefore, is not entitled to attorney's fees at the trial court level or at the appellate level at this stage of the proceedings.

[33] Affirmed and remanded.

Mathias, J. and Weissmann, J., concur.

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[4] Several prior decisions from this court have acknowledged this approach. *See, e.g., Heritage House of Salem, Inc. v. Bailey,* 652 N.E.2d 69, 79-80 (Ind. Ct. App. 1995) (holding that a plaintiff is not a prevailing party where it obtained a preliminary injunction but final judgment was ultimately rendered for the defendant), *trans. denied*; *State Wide Aluminum, Inc. v. Postle Distribs., Inc.,* 626 N.E.2d 511, 516-17 (Ind. Ct. App. 1993) (State Wide was not a prevailing party under Ind. Code § 34–1–32–1(b) (now Ind. Code § 34–52–1–1) because it did not receive a judgment), *trans. denied*; *State ex rel. Prosser v. Ind. Waste Sys., Inc.,* 603 N.E.2d 181, 189 (Ind. Ct. App. 1992) (a favorable ruling on a motion is not a judgment allowing the recovery of costs as a prevailing party).