MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

David W. Stone IV
Anderson, Indiana

ATTORNEY FOR APPELLEES ANGELA AND MARK TROWBRIDGE

Theodore T. Storer
Ft. Wayne, Indiana

ATTORNEY FOR APPELLEES ELIZABETH AND STEPHEN KLAPPER

Michael D. Hawk
Ft. Wayne, Indiana

IN THE COURT OF APPEALS OF INDIANA

REO Holdings Series 3, LLC,

Appellant-Plaintiff,

v.

Angela Trowbridge and Mark Trowbridge,

Appellees-Defendants,

and

Elizabeth Klapper and Stephen R. Klapper,

March 1, 2022

Court of Appeals Case No. 21A-PL-1165

Appeal from the Kosciusko Superior Court

The Honorable Christopher D. Kehler, Judge

Trial Court Cause Nos. 43C01-2010-PL-101 43D04-2009-PL-90

Appellees- Defendants.

Tavitas, Judge.

Case Summary

[1] This appeal arises from a contract dispute for the purchase of a piece of property ("the property"). REO Holdings Series 3, LLC ("REO") entered into a purchase agreement ("the Agreement") with Mark and Angela Trowbridge, the owners of the property. The parties agreed upon two extensions for the closing date. During the time that elapsed as a result of the extensions, the Trowbridges accepted a backup offer to purchase the property from Elizabeth and Stephen Klapper, on the understanding that, if REO failed to close, the Trowbridges would sell the property to the Klappers. At the time of closing, REO's representative did not appear. He was isolated in the hospital with a COVID-19 infection, a fact which REO communicated to the Trowbridges on the date the closing was to take place. That closing did not take place, and two days later, the Trowbridges proceeded to attempt to convey the property to the Klappers; however, REO intervened before the parties could close. REO filed suit against the Trowbridges, alleging breach of contract, and filed a notice of *lis*

pendens, which effectively blocked the sale. The Trowbridges moved to dismiss the suit. The trial court granted the motion, and this appeal ensued. We find that REO failed to allege any grounds in its complaint upon which it could prevail and, thus, affirm the trial court.

Issues

[2] REO raises two issues, which we consolidate and restate as whether the trial court erred when it dismissed REO's complaint.

Facts

[3] REO entered into the Agreement with the Trowbridges on June 21, 2020, for the purchase of property in Kosciusko County. The original closing date was set for July 20, 2020, and the agreed-upon price was $700,000, to be paid in cash. The purchase agreement read, in relevant part: "Time is of the essence. Time periods specified in this Agreement and any subsequent Addenda to the Purchase Agreement are calendar days and shall expire at 11:59 PM of the date stated unless the parties agree in writing to a different date and/or time." Appellant's App. p. 36. On July 20, 2020, REO and the Trowbridges amended the Agreement and extended the closing date to August 15, 2020.[1]

---

[1] This extension was reached by virtue of the following clause:

> The closing of the sale (the "Closing Date") shall be on or before 07/20/2020, or within 30 days after acceptance of offer, whichever is later or this Agreement shall terminate unless an extension of time is mutually agreed to in writing. Any closing date earlier than the latest date above must be by mutual written agreement of the parties.

Appellant's App. Vol. II p. 32.

On August 15, 2020, the parties agreed upon a second extension to August 31, 2020.

[4] On that date, however, REO notified an agent of the Trowbridges that the closing would not proceed because REO's authorized representative was hospitalized.[2] The parties did not agree to a further extension of the closing date. In the meantime, on August 24, 2020, the Trowbridges and Klappers entered into a backup purchase agreement for the same property. By the terms of the backup agreement, the backup offer would only become the primary offer upon the expiration of the Agreement, on August 31, 2020, if the sale was not closed.

[5] On September 2, 2020, the Trowbridges removed the backup contingency from their agreement with the Klappers, and the Klappers' offer became the primary offer. The sale to the Klappers was scheduled to close on or before October 2, 2020. On September 22, however, REO filed a complaint and a notice of *lis pendens*, effectively preventing the Trowbridges and the Klappers from closing the sale. REO sued the Trowbridges on a theory of breach of contract and sought both damages and specific performance. The Klappers then filed an

---

[2] Given the early nature of the proceedings, there is no evidence in the record to support this contention. REO itself, however, made the claim in paragraph 8 of its complaint, and all parties appear to accept the contention's veracity. Accordingly, so do we. We further note that REO offers no explanation as to why it could not merely have sent a different representative to the August 31, 2020 closing, nor does it offer an explanation as to why it did not simply seek a third extension of the closing date. We part ways with the Appellant on its assertion that the reason is "obvious to anyone who is not intentionally being obtuse." Appellant's Reply Br. p. 12. If REO was capable of communicating that it would not be closing on the contractually-mandated date, it was presumably capable of communicating that it wished for a third extension.

action against the Trowbridges seeking specific performance on *their* purchase agreement. The trial court consolidated the actions on November 23, 2020. REO's complaint read, in pertinent part:

> 8. On or about August 31, 2020, Plaintiff notified Defendants' agent that the closing could not proceed on that date because the individual with the requisite authority to fund and sign documents to close the transaction on behalf of Plaintiff had been hospitalized with the COVID-19 Virus for some time and remained hospitalized in isolation in serious condition.
>
> * * * * *
>
> 11. Plaintiff entered into a valid contract with Defendants for the sale and purchase of the above-described real property.
>
> 12. Plaintiff has completed all of its obligations under the contract to close.
>
> 13. Despite demand, Defendants have refused, failed, and/or neglected to perform under the terms of the contract, and has breached said contract by refusing to convey said real property to Plaintiff.
>
> * * * * *
>
> 18. Plaintiff has completed all its obligations under the contract to close and stands ready, willing, and able to fully perform the purchase agreement.
>
> 19. Defendants have so far failed and refused to perform their obligations under the contract by refusing to close.

> 20. Defendants, through their breach of the contract, have wrongfully denied Plaintiff the real property to which Plaintiff is rightfully entitled through specific performance of the contract.

Appellant's App. Vol. II pp. 27-29.

[6] The Trowbridges then moved for judgment on the pleadings under Indiana Trial Rule 12(C), as well as for dismissal of REO's complaint under Indiana Trial Rule 12(B)(6). After a hearing on January 7, 2021, the trial court granted the motion and dismissed the case pursuant to both rules. The trial court found, in relevant part, that:

> 8. Paragraph 12 of REO's Complaint alleges that REO has completed all of its obligations under the contract to close. The Court disagrees given that REO failed to attend the closing on August 31, 2020.
>
> 9. Paragraph 13 of REO's Complaint alleges that Trowbridge breached the contract by refusing to convey real estate. The Court finds that REO breached the contract by failing to attend the closing on August 31, 2020.
>
> * * * * *
>
> 10. . . . Here, the Purchase Agreement specifically indicates that time is of the essence. In fact, the parties' actions of extending the closing date on two occasions (Amendment 1 and Amendment 2) indicate that the parties intended that time was to be a controlling element of the contract. Both parties clearly conducted themselves as if time was of the essence.
>
> * * * * *

> 12. Here, there was no agreement to a third amendment extending the closing date beyond August 31, 2020. By its own terms, the Purchase Agreement became legally defunct and no longer enforceable once the closing failed to occur on August 31, 2020.
>
> 13. Similar to the facts in *Smith*, REO's failure to close the transaction within the time called for in the contract extinguished Trowbridge's obligation to convey the property. As a result, the Court finds that there is no claim upon which relief can be granted against Trowbridge as there was no obligation to convey any real estate given that the contract became legally defunct and no longer enforceable once the closing failed to occur on August 31, 2020.

Appellant's App. Vol. II pp. 22-24. REO filed an unsuccessful motion to reconsider, and this appeal ensued.

Analysis

[7] REO argues that: (1) a Indiana Trial Rule 12(C) motion "was premature and it was error for the trial court to grant it . . ."; and (2) dismissal under Indiana Trial Rule 12(B)(6) was improper because "[t]he Trowbridges did not exercise good faith when they elected to take advantage of the illness of REO's representative in order to go ahead with the sale of the property to the Klappers at a higher price." Appellant's Br. p. 7. Both of REO's arguments fail.

[8] Indiana Trial Rule 12 reads, in pertinent part:

> (B) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive

> pleading thereto if one is required; except that at the option of the pleader, the following defenses may be made by motion:
>
> > . . . (6) Failure to state a claim upon which relief can be granted . . . .
> >
> > * * * * *
> >
> > (C) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Ind. T.R. 12.

[9] "Our review of a trial court's denial of a motion to dismiss under Trial Rule 12(B)(6) is de novo and requires no deference to the trial court's decision." *Anonymous Physician 1 v. White*, 153 N.E.3d 272, 277 (Ind. Ct. App. 2020) (citing *Sims v. Beamer*, 757 N.E.2d 1021, 1024 (Ind. Ct. App. 2001)).

> "A motion to dismiss under Rule 12(B)(6) tests the legal sufficiency of a complaint: that is, whether the allegations in the complaint establish *any* set of circumstances under which a plaintiff would be entitled to relief." *Trail v. Boys and Girls Clubs of Northwest Ind.*, 845 N.E.2d 130, 134 (Ind. 2006) (emphasis added). "Thus, while we do not test the sufficiency of the facts alleged with *regards to their adequacy to provide recovery*, we do test their sufficiency with regards to whether or not they have stated

> *some* factual scenario in which a legally actionable injury has occurred." *Id.* When reviewing a Trial Rule 12(B)(6) motion to dismiss, we accept the facts alleged in the complaint as true and view the pleadings in a light most favorable to the nonmoving party and with every reasonable inference in the nonmoving party's favor. *Id*.

Id. (emphasis added). For these reasons, we regard motions to dismiss "'with disfavor because such motions undermine the policy of deciding causes of action on their merits,'" *id*. (quoting *McQueen v. Fayette County Sch. Corp.*, 711 N.E.2d 62, 65 (Ind. Ct. App. 1999), *trans. denied*.), which is our strong preference.

[10] > A plaintiff need not set out in precise detail the facts upon which the claim is based[,] but must still plead the operative facts necessary to set forth an actionable claim. Indeed, under the notice pleading requirements, a plaintiff's complaint needs only contain a short and plain statement of the claim showing that the pleader is entitled to relief. A complaint's allegations are sufficient if they put a reasonable person on notice as to why plaintiff sues. Defendants thereafter may flesh out the evidentiary facts through discovery.

Id. (internal citations and quotations omitted). "Dismissals are improper under 12(B)(6) 'unless it appears *to a certainty* on the face of the complaint that the complaining party is not entitled to any relief.'" *Id*. (quoting *Bellwether Properties, LLC v. Duke Energy Indiana, Inc.*, 87 N.E.3d 462, 466 (Ind. 2017)) (emphasis in original). "In addition, dismissals under T.R. 12(B)(6) are 'rarely appropriate.'" *Id*. (quoting *State v. American Family Voices*, Inc., 898 N.E.2d 293, 296 (Ind. 2008)).

[11] We further note that:

> The standard of review for a ruling on a motion for judgment on the pleadings under Indiana Trial Rule 12(C) is de novo. *Consolidated Ins. Co. v. National Water Servs., LLC*, 994 N.E.2d 1192, 1196 (Ind. Ct. App. 2013), *trans. denied*. A ruling on a Rule 12(C) motion must be based solely on the pleadings, as well as any facts of which judicial notice may be taken, and courts must accept the properly-pleaded material facts alleged in the complaint as true. *Id*. A motion for judgment on the pleadings may be granted only if it is clear from the face of the complaint that relief could not be granted to the plaintiff under any circumstances. *Id*.

Celadon Trucking Servs., Inc. v. Wilmoth, 70 N.E.3d 833, 839-40 (Ind. Ct. App. 2017), *trans. denied*. As we explain below, however, this standard has no application to the instant case.

I. Dismissal Under Rule 12(C)

[12] We first address an element of confusion in the proceedings below that repeats itself in the briefing of the parties before this Court. REO makes much of the fact that the Trowbridge's motion below cited both Indiana Trial Rule 12(C) and Indiana Trial Rule 12(B)(6) and that the trial court granted relief on both grounds. REO argues that a ruling pursuant to Rule 12(C) is premature because the Trowbridges had yet to file an answer, and therefore, the pleadings remained open.

[13] It is well settled, however, that: "Where, as here, a Trial Rule 12(C) motion for judgment on the pleadings essentially argues that the complaint fails to state a

claim upon which relief can be granted, we treat it as a Trial Rule 12(B)(6) motion." *City of Gary v. Smith & Wesson Corp.*, 126 N.E.3d 813, 822-23 (Ind. Ct. App. 2019) (citing *KS & E Sports v. Runnels*, 72 N.E.3d 892, 898 (Ind. 2017)), *trans. denied*; *see also Gregory & Appel, Inc. v. Duck*, 459 N.E.2d 46, 49 (Ind. Ct. App. 1984). Notwithstanding the fact that the Trowbridges sought relief pursuant to both Rule 12(C) and Rule 12(B)(6) "in the alternative[,]" Appellant's App. Vol. II p. 66, the Trowbridges only argue that "[i]t is clear from the face of [REO] Holdings' complaint that under no circumstances can relief be granted in [REO] Holdings' favor." *Id*. at 67. Any error associated with the timeliness of the Rule 12(C) motion is harmless, because we treat that motion as we would a motion under Rule 12(B)(6), which was timely under the circumstances of this case. The fact that the Trowbridges styled their argument as being, in part, based on Rule 12(C) is of no moment.

II. Dismissal Under Rule 12(B)(6)

[14] The Trowbridges' argument below was that it is axiomatic that an expired contract cannot be enforced by a court of law. The Trowbridges (and Klappers) contend that the Agreement had expired. Since all of REO's claims rely on the existence of a current, enforceable contract, none of REO's claims present any possibility of success. We agree with this reasoning.

[15] > When a written agreement to convey real property makes time of the essence, fixes a termination date, and there is no conduct giving rise to estoppel or waiver, the agreement becomes legally defunct upon the stated termination date if performance is not tendered. *Smith v. Potter*, 652 N.E.2d 538, 542 (Ind. Ct. App.

> 1995), *trans. denied*. Where time is of the essence of the contract and a time for performance is specified, strict performance at that point of time is necessary unless waived. *Id*.

Barrington Mgmt. Co. v. Paul E. Draper Fam. Ltd. P'ship, 695 N.E.2d 135, 141 (Ind. Ct. App. 1998). We find little difficulty in concluding that the parties intended to enter into an agreement in which time was of the essence. The Agreement quite literally says so: "Time is of the essence. Time periods specified in this Agreement and any subsequent Addenda to the Purchase Agreement are calendar days and shall expire at 11:59 PM of the date stated unless the parties agree in writing to a different date and/or time." Appellant's App. p. 36. Thus, the contract was legally defunct after REO failed to appear for the scheduled closing. No party claims that any extension beyond August 31, 2020, was sought. A contract that contains a "time is of the essence" provision has an expiration date that simply cannot be ignored.

[16] Additionally, "[a] party seeking specific performance of a real estate contract must prove that he has substantially performed his contract obligations or offered to do so." *Kesler v. Marshall*, 792 N.E.2d 893, 896 (Ind. Ct. App. 2003) (citing *Ruder v. Ohio Valley Wholesale, Inc.*, 736 N.E.2d 776, 779 (Ind. Ct. App. 2000)), *trans. denied*. This, REO cannot do.[3] The Agreement became legally

[3] It is, of course, true that we must accept the facts as alleged in the complaint as true for purposes of a Rule 12(B)(6) ruling. *See, e.g., Veolia Water Indianapolis LLC v. National Trust. Ins. Co.*, 3 N.E.3d 1, 4-5 (Ind. 2014). And it is true that REO alleged in its complaint that it had complied with the terms of the contract and upheld its obligations thereupon. That is not a factual allegation, however, but a legal characterization by which we are not bound under a de novo standard of review.

defunct once REO failed to close the deal. The fact that REO, several weeks later, was prepared to close is of no moment when time was of the essence.

[17] Finally, we turn to REO's contention that the Trowbridges failed to act in good faith. We note that the argument fails in a fundamental sense: we are limited to the allegations in the pleadings, and REO's complaint makes no claim that the Trowbridges violated the good faith clause in the Agreement.[4] Below, REO unsuccessfully argued that it was suing on a theory of breach of contract, and if the Trowbridges had acted in bad faith, such action would constitute a breach. The theory that REO advanced in its complaint, however, was that the Trowbridges breached the Agreement by "refusing to convey said real property." Appellant's App. Vol. II p. 28. Rule 12(B)(6) does not call upon us to evaluate the potential merits of claims not actually advanced by the pleadings.

[18] Nevertheless, we address the argument, given its extensive treatment by the parties. In its briefing before this Court, REO quotes Black's Law Dictionary for the definition of good faith and then argues that: "The Trowbridges sought

---

[4] The clause reads as follows:

> LEGAL REMEDIES/DEFAULT: If this offer is accepted and Buyer fails or refuses to close the transaction, without legal cause, the earnest money shall be retained by Seller for damages Seller has or will incur. Seller retains all rights to seek other legal and equitable remedies, which may include specific performance and additional monetary damages. All parties have the legal duty to use good faith and due diligence in completing the terms and conditions of this Agreement. A material failure to perform any obligation under this Agreement is a default which may subject the defaulting party to liability for damages and/or other legal remedies, which, as stated above, may include specific performance and monetary damages in addition to loss of Earnest Money.

Appellant's App. Vol. II p. 32.

to take advantage of the serious illness of REO's key man to avoid the sales agreement. This is contrary to the obligation of good faith the parties agreed to." Appellant's Br. pp. 13-14. Contracts are agreements between parties with terms, contingencies, and safeguards as the contracting parties see fit. REO agreed to the terms in the Agreement, including the closing deadline. We find the record devoid of any indication that the Trowbridges were not prepared to close on the date set forth in the Agreement. "Good faith," in this context, requires an obligation. Without a legally enforceable contract, no obligation existed.

[19] REO was well aware on the date of the closing that it could not complete the closing. The reasons are irrelevant. REO had the option to seek a third extension. It did not. That decision released the Trowbridges of their obligation to hold the property and complete the sale. One cannot breach a contract that no longer exists.[5] Accordingly, REO has not alleged in its complaint any facts that would allow for it to recover on any theory of breach of contract.

[5] REO's complaint does not allege that there was an oral agreement to extend the closing deadline, nor does it allege that the "time is of the essence" clause was ever waived by the parties. To the extent that REO makes these arguments in its brief, they are waived. "'We will not become an advocate for a party or address arguments that are inappropriate or too poorly developed or expressed to be understood.'" *Picket Fence Prop. Co. v. Davis*, 109 N.E.3d 1021, 1029 (Ind. Ct. App. 2018) (quoting *Basic v Amouri*, 58 N.E.3d 980, 984 (Ind. Ct. App. 2016)).

Conclusion

[20] The trial court did not err in granting the Trowbridges' motion to dismiss REO's complaint. We affirm.

[21] Affirmed.

Bradford, C.J., and Crone, J., concur.