



Rolando and Jacquelyn Curington (“the Curingtons”) appeal the judgment in favor of Joseph and Carol Allegretti (“the Allegrettis”). We affirm.

### FACTS AND PROCEDURAL HISTORY

On May 20, 2005, the Curingtons agreed to purchase a home from the Allegrettis. The parties signed various documents at that time, including a Purchase Agreement for the real estate, and a Personal Property Agreement for certain items in or related to the house.

The Purchase Agreement provided in relevant part:

**N. MISCELLANEOUS PROVISIONS:** The transaction shall be closed in accordance with the following:

\* \* \* \* \*

4. Attachments: [The following were checked: “Indiana Seller’s Residential Real Estate Disclosure Form,” “Personal Property Agreement,” and “Addendum # (s) 1.”]

\* \* \* \* \*

**R. DEFAULT BY EITHER PARTY:** If this Agreement is accepted and Purchaser shall fail or refuse to close the transaction, without legal cause, Purchaser shall pay to Seller as damages, and not as a penalty, an amount equal to fifteen percent (15%) of the purchase price. If Seller shall fail or refuse to close the transaction, without legal cause, Seller shall pay to Purchaser as damages and not as a penalty, an amount equal to fifteen percent (15%) of the purchase price. In the event Purchaser or Seller breach the accepted Agreement and fail or refuse to close, or in the event that they mutually agree not to close or to rescind this completed Agreement, the breaching party or parties shall be liable to the Broker for the professional service fee that would have been earned had the sale been consummated, together with reasonable attorney fees, costs and interest. Either the Purchaser or Seller shall be entitled to sue the other party either for specific performance, [sic] rescission or for damages. If either party sues the other to collect said damages, the unsuccessful party shall be obligated to pay the successful party’s reasonable costs and attorney fees as part of any judgment recovered, all without relief from valuation and appraisal laws.

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**W. TERMS BINDING:** No verbal agreements shall bind the parties. All terms and conditions of this transaction are included in this Agreement and in any attached Addendums, and this Agreement shall inure to the benefit of and be binding on the parties hereto, their heirs, personal representatives and successors. There shall be no assignment of this Agreement (other than by operation of law) by either party without the written consent of the other party.

**X. FURTHER CONDITIONS:** 1. House must appraise at or above selling price. 2. Subject to acceptable inspection reports. 3. Subject to purchasers closing on sale of their current residence scheduled for June 14, 2005. Seller may actively show and accept back up offers during this period. Back up offers may not void or replace this offer prior to June 16, 2005.

(App. of Appellant, Tab 9.)<sup>1</sup> The Personal Property Agreement provided as follows:

Date: May 20, 2005

Purchaser offers to buy the following described personal property: refrigerator, dishwasher, existing big screen TV in basement, all window treatments, garage door openers and copy of original house blueprints (hereinafter called the "Personalty") which is present located on the real estate (the "Property") known as [address omitted] in accordance with the terms and conditions set forth below.

A. Purchaser has offered to purchase the above described Property (real estate) for the purchase price of \$ [omitted] from Joe and Carol Allegretti (the owner of the Property and the Personalty and hereinafter called the "Seller") under the terms and conditions of certain Purchase Agreement dated the same date as this Personal Property Agreement.

B. If the sale of the Property is consummated, Seller shall sell the Personalty to Purchaser at the same time by delivery to Purchaser of an executed Bill of Sale in a form substantially similar to the then current form of the Greater Northwest Indiana Association of REALTORS, Inc. No separate purchase price will be paid to Seller for the Personalty because such price is included in the purchase price for the Property as described in paragraph A above, and the consideration for the sale of the Personalty is the consummation of the sale of the Property. If there is a termination of

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<sup>1</sup> We remind counsel for the Curingtons the pages in the appendix must be numbered consecutively. *See* Ind. Appellate Rule 51(C) ("All pages of the Appendix shall be numbered at the bottom consecutively, without obscuring the Transcript page numbers, regardless of the number of volumes the Appendix requires.").

the Purchase Agreement for any reason, such termination will automatically terminate this Personal Property Agreement.

C. Possession of the Personalty shall be delivered by Seller to Purchaser at the time and in the condition as provided for delivery of possession of the Property, in paragraph F [sic]<sup>2</sup> of the Purchase Agreement. In the event any item of Personalty is not delivered to Purchaser at the time possession of the Property is delivered to Purchaser or any such item has been damaged or is not in its present condition, Seller shall be responsible to replace any missing item or repair or replace any damaged item or any item not in its present condition.

D. If Purchaser institutes legal proceedings against Seller to collect any damages to which [sic] Purchaser is entitled to collect because of the failure of Seller to fulfill any of Seller's obligations under the provisions of this Personal Property Agreement, the Seller shall be obligated to pay Purchaser's reasonable costs and attorney fees as part of any judgment recovered, all without relief from valuation and appraisal laws.

(*Id.*) (handwritten portions underlined, footnote added).

Prior to the rescheduled closing in June 2005, the Allegrettis had difficulty locating blueprints for the house as built. However, the Allegrettis provided the Curingtons with house plans of some kind prior to closing. Rolando Curington appeared at the closing with those house plans but refused to proceed with the closing because the Allegrettis had not provided appropriate blueprints. Joseph Allegretti retrieved the previously provided house plans from Curington. Curington left the meeting without closing on the house. After leaving the closing, Rolando Curington filed a police report alleging Joseph Allegretti had stolen blueprints from him.

On August 4, 2005, the Allegrettis filed a two-count complaint for damages against the Curingtons, alleging breach of contract and defamation. The Allegrettis moved for summary judgment in December 2005. On June 12, 2006, the trial court

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<sup>2</sup> Paragraph F of the Purchase Agreement establishes the closing date. Paragraph G concerns possession.

found in favor of the Allegrettis and entered summary judgment against the Curingtons for the amount specified in the liquidated damages clause of the contract plus attorney fees for the breach of contract claim.<sup>3</sup>

### **DISCUSSION AND DECISION**

When reviewing a grant or denial of summary judgment, we apply the same standard the trial court does. *Rogier v. Am. Testing & Eng'g Corp.*, 734 N.E.2d 606, 613 (Ind. Ct. App. 2000), *trans. denied* 753 N.E.2d 8 (Ind. 2001). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). We do not weigh the evidence; rather, we consider the facts in the light most favorable to the nonmovant. *Rogier*, 734 N.E.2d at 613.

The essential elements of a breach of contract action are the existence of a contract, the defendant's breach thereof, and damages. *Nieto v. Kezy*, 846 N.E.2d 327, 333 (Ind. Ct. App. 2006). "A party first guilty of a material breach of contract may not maintain an action against the other party or seek to enforce the contract against the other party should that party subsequently breach the contract." *Licocci v. Cardinal Assoc., Inc.*, 492 N.E.2d 48, 52 (Ind. Ct. App. 1986), *reh'g denied, trans. denied*.

The Curingtons argue the trial court erred in granting summary judgment. They assert the Personal Property Agreement was indivisible from the Purchase Agreement. Therefore, the Curingtons argue, the Allegrettis' failure to provide appropriate blueprints

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<sup>3</sup> The trial court also found in favor of the Allegrettis on the defamation claim, but the Curingtons do not appeal that portion of the court's judgment.

for the house was a material breach of the contract, which breach excused the Curingtons' subsequent failure to close on the house. We disagree.

Whether viewed as one contract or two, the Personal Property Agreement was contingent on the consummation of the sale of the Property under the Property Agreement. Paragraph B of the Personal Property Agreement indicates the Allegrettis were obligated to sell the personalty "if the sale of the Property is *consummated*." (Appellant's App. at Tab 9) (emphasis added). The same paragraph provides "the consideration for the sale of the Personalty is the *consummation* of the sale of the Property." (*Id.*) The Personal Property Agreement terminates automatically "if there is a termination of the Purchase Agreement *for any reason*[".]” (*Id.*) The Purchase Agreement is mentioned three times in the Personal Property Agreement.

In contrast, the only mention of the Personal Property Agreement in the Purchase Agreement is Paragraph N, where it is listed as an attachment. The Purchase Agreement was contingent on appropriate financing, appraisals, and inspections, and the sale of the Curingtons' current residence. Had the Curingtons wanted to make the Purchase Agreement contingent on the provision of appropriate blueprints, such a contingency could have been included in the Purchase Agreement.

Consequently, until the sale of the Property was consummated, neither party had rights or duties under the Personal Property Agreement. Because the sale of the Property was not consummated, the Personal Property Agreement terminated and the Allegrettis were not obligated to sell the personalty to the Curingtons. Any failure of the Allegrettis

to provide acceptable blueprints of the house to the Curingtons at or prior to closing was not a breach of the Property Agreement.

There is no genuine issue of material fact whether the Allegrettis breached the Purchase Agreement before the Curingtons declined to close on the Property. Accordingly, their failure to close breached an existing contract, entitling the Allegrettis to liquidated damages. The trial court properly granted summary judgment.

We affirm.

NAJAM, J., and MATHIAS, J., concur.