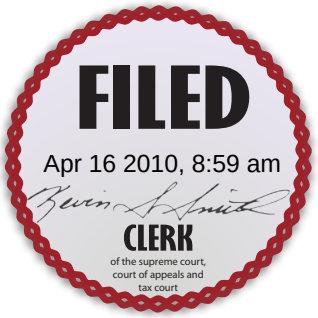

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IN THE COURT OF APPEALS OF INDIANA

KEVIN MADISON and VALERIE MADISON,	)	
	)	
Appellant-Defendants,	)	
	)	
vs.	)	No. 56A03-0908-CV-389
	)	
JERRY GIES and PEGGY GIES,	)	
	)	
Appellee-Plaintiffs.	)	

APPEAL FROM THE NEWTON SUPERIOR COURT
The Honorable Daniel J. Molter, Judge
Cause No. 56D01-0702-PL-2

April 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Jerry and Peggy Gies contracted to purchase real estate from Kevin and Valerie Madison. The transaction did not close, and the Gieses sued the Madisons for return of their earnest money and for the value of improvements they made to the property. The Madisons counterclaimed for damages. The trial court found in favor of the Gieses, and we affirm.

FACTS AND PROCEDURAL HISTORY

In 2006, the Madisons were building a new home, and they were offering for sale a separate parcel of land that they owned. On that property, there was a barn or shop, which had a habitable apartment upstairs. There was also a separate foundation on the property. Jerry and Peggy Gies wanted to sell their farm and were interested in purchasing the Madisons' property. They envisioned remodeling the shop so that there were bedrooms upstairs and a kitchen and living room downstairs. Their daughter would live in the remodeled building, and they would put a modular home on the other foundation for themselves.

On August 27, 2006, the Gieses signed an agreement that provided:

> 3. Survey and Title Evidence.
>
> Vendor, at Vendor's expense, shall furnish Purchaser a commitment for an Owner's Policy of Title Insurance in an amount equal to the amount of the Purchase Price from a company acceptable to Purchaser insuring marketable title subject only to such exceptions as are permitted by this Contract. . . . The title evidence selected and a survey, if required, shall be ordered by the Vendor therefor immediately after acceptance of this offer.
>
> * * * * *
>
> 9. Closing and Possession.
>
> 9.1 The transaction shall be closed at a time and place acceptable to the parties but in no event later than September 15, 2006. Either party may, however, request and receive a 30 day extension of the closing date in the event the transaction cannot be closed due to delay in obtaining the title evidence, title clearance work, survey or loan approvals, delay in completion

> of the Vendor's new residence or delay in the sale of Purchaser's existing house, provided that such delay does not result from the fault of the party requesting the extension.

(Plaintiffs' Ex. 1.) The Madisons signed the agreement on September 6, 2006. That same day, the Gieses paid the Madisons $27,600.00 as earnest money. This sum was twenty percent of the purchase price of $138,000.00.

The parties continued to negotiate after signing the agreement, and on September 23, 2006, they signed a slightly modified version of their original agreement. The provisions regarding title insurance and closing remained the same, even though the closing date had passed.

The Gieses hoped to close on the Madisons' property first so that they could begin the remodeling before closing on their farm. The Gieses obtained an estimate from Mike Cripe for the remodeling they intended to do. On October 20, 2006, the Gieses obtained a bridge loan of $150,000.00 based on Cripe's estimate and the purchase price of the Madisons' property. According to the Gieses, Kevin made arrangements to close on October 23, 2006; however, he did not follow through with the closing. The Gieses were willing and able to close, and on at least two occasions, Jerry offered Kevin a check for the remainder of the purchase price. Kevin refused those checks without explanation.

The Gieses had to be out of their home by November 15, 2006, and were anxious to begin the renovations on the Madisons' property. Toward the end of October, Kevin gave the Gieses permission to begin working on the property. Kevin did not want Cripe to do the work, because he was concerned about his liability. Kevin told the Gieses he could save

them some money, and they agreed the Gieses would do the repairs themselves with Kevin's help. The Gieses understood that Kevin would be acting as their general contractor and would be responsible for finding subcontractors.[1] On October 24, 2006, Jerry applied for a building permit, which was approved the next day. Kevin selected a carpenter, an electrician, and a plumber to work on the premises. The Gieses paid for the carpenter and some of the supplies used to remodel the building. The Madisons paid the electrician and the plumber.

Kevin scheduled another closing date for November 18, 2006, and the Gieses got an extension from their buyers so that they could remain in their home until December 15. Once again, Kevin did not follow through with the closing. The following Sunday, Kevin or a subcontractor was supposed to be present to help with the renovation, but no one showed up.

On November 20, 2006, the Gieses consulted an attorney, and on their attorney's advice, they recorded their contract with the Madisons. On December 5, 2006, the Gieses' attorney sent the Madisons' attorney a letter demanding rescission of the contract and return of the earnest money. The letter stated the Gieses had to be out of their home by December 14, 2006. On December 6, 2006, the Gieses made an offer on another property. That transaction closed, and the Gieses moved in on December 16, 2006. The Gieses also closed on their farm around that time and repaid the bridge loan on December 15, 2006.

On December 15, 2006, the Madisons' attorney faxed a title commitment to the Gieses' attorney. The commitment was dated November 29, 2006. A letter accompanying

[1] A letter from the Madisons' attorney supports this characterization; however, Kevin testified he simply offered the Gieses a list of contractors with whom he had worked. It was undisputed that the Gieses did not pay Kevin for any work he did on the premises.

the fax stated the Madisons still desired to close and were able to do so by December 18, 2006. This fax was the first time the Madisons had offered a title commitment to the Gieses. The Madisons ultimately sold their property to someone else for $132,000.00.

On February 8, 2007, the Gieses filed a complaint seeking the return of their earnest money and reimbursement for the work they did on the building under a theory of unjust enrichment. On May 30, 2007, the Madisons filed a counterclaim for the difference between the sale price and the contract price. They alleged the Gieses had damaged rather than improved the property.

At the bench trial, Kevin testified no closing was scheduled in October 2006 and denied that the Gieses had offered to pay for the property. Kevin stated he was unaware of the bridge loan and thought the Gieses wanted to close on their farm before closing on the Madisons' property. He testified a closing had been scheduled for November 14, but he did not explain why that closing did not take place. He claimed he asked the Gieses to pay for the property before starting the remodeling, but he allowed them to proceed because Jerry "wore [him] out." (Tr. at 146.) On April 13, 2009, the trial court entered judgment for the Gieses, awarding them the $27,600.00 in earnest money and $6,016.16 toward the improvements they made.

DISCUSSION AND DECISION

The Madisons argue the trial court erred in interpreting the contract and erred by finding they had been unjustly enriched.

1. Contract Interpretation

The construction of a written contract is generally a question of law. *The Winterton, LLC v. Winterton Investors, LLC*, 900 N.E.2d 754, 759 (Ind. Ct. App. 2009), *trans. denied*. When interpreting a contract, we attempt to determine the intent of the parties at the time the contract was made. *Id*. When the language of the contract is unambiguous, the parties' intent is determined from the four corners of the document. *Id*. "The unambiguous language of a contract is conclusive upon the parties to the contract as well as upon the court." *Id*.

A contract is ambiguous when a reasonable person could find its terms susceptible to more than one interpretation. *Id*. If a contract is ambiguous, the court may consider extrinsic evidence, and the construction of the contract becomes a matter for the trier of fact. *Id*. "Under that scenario, our review of a court's findings is deferential," and we review the findings pursuant to Ind. Trial Rule 52. *Evans v. Medical & Professional Collection Servs., Inc.*, 741 N.E.2d 795, 797-98 (Ind. Ct. App. 2001). We will not reverse the trial court's findings or conclusions unless they are clearly erroneous. *Morgan County v. Ferguson*, 712 N.E.2d 1038, 1045 (Ind. Ct. App. 1999). Findings of fact are clearly erroneous if there is no evidence or reasonable inference to support them. *Id*. We consider only the evidence favorable to the judgment and the reasonable inferences flowing therefrom, and we will not reweigh the evidence or assess witness credibility. *Id*. We may affirm the judgment on any basis supported by the findings. *Id*.

The parties agree the terms of their second agreement control. That agreement stated closing was to take place on September 15, 2006; however, the agreement was not signed

until September 23, 2006. Thus, the parties could not have intended to close on September 15. The Gieses argue it was still possible to execute the terms of the agreement because it provided for a thirty-day extension. Assuming *arguendo* the signing of the second agreement evinced intent to exercise the thirty-day extension,[2] it does not appear the parties were prepared to close on October 15. The Gieses did not obtain their bridge loan until October 20, and the Madisons did not obtain a title commitment until November 29.[3] Nevertheless, the parties scheduled a closing for October 23 and continued to act as though they intended to consummate the deal.

Therefore, to the extent the trial court found the September 15 closing date, with or without a thirty-day extension, was of the essence, we disagree. *See Hollars v. Randall*, 554 N.E.2d 1177, 1179 (Ind. Ct. App. 1990) ("The contract in this case does not contain a provision making time of the essence. Moreover, this court has previously indicated that merely specifying a certain date for closing does not make time of the essence.") (citation omitted). Therefore, the contract had to be performed within a reasonable time. *See Winterton*, 900 N.E.2d at 764 ("When the parties to an agreement do not fix a concrete time for performance, the law implies a reasonable time."). "What constitutes a reasonable time depends upon the subject matter of the contract, the circumstances attending the performance of the contract, and the situation of the parties to the contract." *Id*.

[2] As set out above, the agreement listed specific reasons for which an extension could be sought. There was no evidence the Gieses or Madisons wanted to extend the closing date for any of the reasons listed.

[3] Kevin testified he had obtained a policy in August, before the parties entered their first agreement. However, that policy was for DeMotte State Bank, which held a mortgage on the property and apparently was financing the construction of the Madisons' new home.

The trial court credited the Gieses' testimony that a closing was scheduled for October 23, 2006. The Gieses had obtained a bridge loan and were prepared to close on that date, but the closing did not occur. Kevin scheduled another closing date in November. Once again, the Gieses were prepared to perform, but the Madisons did not. The court noted Kevin's testimony he had obtained title evidence in August; however, the court found it was not furnished to the Gieses until December 15, 2006. By that time, the Gieses were required to vacate their property.

The trial court found the Madisons were aware of the Gieses' time constraints, and the evidence supports that finding. Kevin testified he thought the Gieses wanted to close on their farm first, but the court apparently credited the Gieses' testimony that they wanted to close on the Madisons' property first so they could commence renovations as soon as possible. The Madisons knew the Gieses wanted to do substantial remodeling, as Kevin was involved in that work. However, the Madisons did not close on the property so the Gieses could hire their own contractors to do the work, nor did they help the Gieses complete the renovations in a timely manner.[4] When the Gieses decided to rescind the contract, only thirty to thirty-five percent of the work they wanted done had been completed. This evidence supports a conclusion the Madisons did not perform within a reasonable time.[5]

[4] The trial court found: "[Kevin] opined that he could do the work at substantially less cost [than Cripe] and was willing to do so or at least oversee completion under his direction. Often times however, work was not timely completed under his supervision and in some instances, contractors selected by him never showed up at all." (Appellants' App. at 9.)

The Madisons' arguments to the contrary are not persuasive. The Madisons dispute the trial court's characterization of October 23 and November 18, 2006, as planned closing dates. In their brief, they claim Jerry offered a personal check on October 23, and no formal closing was planned.[6] They also note November 18 was a Saturday, and argue it was unlikely a formal closing would take place on a weekend. Much of the parties' dealings were conducted in a highly informal manner, and they may not have anticipated a closing with all the typical formalities. The trial court clearly credited the Gieses' testimony that the parties intended to close on these dates, and that finding is not clearly erroneous.[7]

The Madisons also argue the Gieses manifested intent to close the deal even after November 18, noting they recorded the contract on November 20. The Gieses testified they recorded the contract on the advice of their attorney in order to protect the money they had already put into the property. Therefore, the fact that they recorded the contract is not inconsistent with the trial court's finding the Madisons unreasonably delayed the closing.

The Madisons also argue they are entitled to hold the Gieses to the contract because the Gieses acquiesced in the delay. The Madisons rely on the following language from *Keliher v. Cure*:

> A purchaser, following demonstration of a seller's acquiescence in delay, is entitled to expect the seller to continue to abide by the contract until notice is given to the contrary. Conversely, when the seller expresses a willingness to

[5] While some of the language in the trial court's order suggests it found the September 15, 2006 closing date – with an extension – to be of the essence, the trial court also found the Madisons' failure "to monitor the production of title work in a timely fashion is both mysterious and unreasonable." (Appellants' App. at 8.)

[6] As noted above, Kevin testified at trial that the Gieses never offered him a check.

[7] The Madisons note the agreement requires that "[t]he transaction shall be closed at a time and place acceptable to the parties." (Plaintiffs' Ex. 1.) They argue the parties never agreed on a time and place for closing; however, as discussed above, the trial court found there were at least two agreed-upon closing dates.

> acquiesce in a delay and to assist the purchaser to carry out the contract after a time limit has expired, the seller is entitled to rely upon the purchaser to not suddenly renege on the bargain.

534 N.E.2d 1133, 1137 (Ind. Ct. App. 1989) (citations omitted).

The Cures entered an agreement to purchase a house from Keliher. The agreement provided the Cures had until February 6, 1984 to obtain financing and that closing would take place no earlier than March 4. The Cures were unable to obtain financing by February 6, but they continued to negotiate and eventually obtained financing by February 14. Keliher acquiesced in this delay. However, the Cures ultimately decided they were unable to afford the property and argued they were not obligated to perform because the condition regarding financing had not been met. We concluded the February 6 deadline for obtaining financing was not of the essence because Keliher had acquiesced in the delay and the parties were still capable of closing by March 4. *Id*. at 1138.

Keliher is distinguishable. The Gieses acquiesced in the delay until November 18, but they told the Madisons no later than December 5 that they were no longer willing to delay the closing and that they had to be out of their home by December 14 or 15. On December 15, the Madisons provided a title commitment for the first time and offered to close on December 18. In *Keliher*, the seller acquiesced in a short delay while the buyers actively worked on securing the necessary financing, and the parties were still able to close on the scheduled closing date. The Madisons, however, should have known a closing on December 18 was unacceptable to the Gieses, and they offer no explanation for not providing the title commitment sooner. Therefore, we conclude the trial court did not err by finding the

Madisons had not performed within a reasonable time.

2. Unjust Enrichment

The Madisons argued the trial court erred by finding they had been unjustly enriched and awarding damages to the Gieses. Unjust enrichment is also referred to as *quantum meruit*, contract implied-in-law, constructive contract, or quasi-contract. *Bayh v. Sonnenburg*, 573 N.E.2d 398, 408 (Ind. 1991), *reh'g denied*, *cert. denied*.

> A quasi-contract, of course, is not a contract at all; it "is a legal fiction invented by the common-law courts in order to permit a recovery . . . where, in fact, there is no contract, but where the circumstances are such that under the law of natural and immutable justice there should be a recovery as though there had been a promise." The Restatement of Restitution sets out the theory broadly: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." Restatement of Restitution § 1 (1937).
>
> To prevail on a claim of unjust enrichment, a plaintiff must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust. One who labors without an expectation of payment cannot recover in quasi-contract.

Id. (footnote and some citations omitted).

The Madisons first argue the Gieses may not recover damages for unjust enrichment because the purchase agreement limits their remedy to return of the earnest money. *See id*. at 409 (recovery cannot be grounded on a claim of unjust enrichment when a contract controls the rights of the parties). The Gieses initially wanted Cripe to do the work and obtained an estimate from him. On October 20, 2006, the Gieses obtained the bridge loan based in part on Cripe's estimate. However, Kevin did not want Cripe to work on the property and agreed to help the Gieses do the work for less money. The work began around October 23, 2006.

The purchase agreement, however, had been signed on September 23, 2006, and did not address the remodeling the Gieses wanted done. It appears that the agreement concerning the remodeling was separate from and subsequent to the purchase agreement. Therefore, we cannot say the purchase agreement controls this issue.

Next, the Madisons argue the remodeling work did not benefit them. They note the work was only thirty to thirty-five percent complete when the Gieses rescinded the purchase agreement and they ultimately sold the property for less than the Gieses had agreed to pay. They also argue the remodeling work was unique to the Gieses' intended use of the property. The trial court recognized that some of the work was specific to the Gieses interests, and the court therefore did not award the Gieses the full amount they requested. But there was testimony to support the court's finding the work was of some benefit to the Madisons. Peggy testified the shop building was in a poor condition before they began their work: "[T]he pipes had burst and the water had gotten in and insulation was laying all over everything." (Tr. at 24.) Jerry testified they cleaned up the wet insulation and installed new windows, doors, closets, and a shower, all of which he felt were improvements to the property.

The Madisons also argue the Gieses did not expect to be paid.

> To recover under the theory of implied contract or quantum meruit, the plaintiff is usually required to establish that the defendant impliedly or expressly requested the benefits conferred. Additionally, relief will be denied if the plaintiff did not contemplate a fee in consideration of the benefit *or* if the defendant could not reasonably believe the plaintiff expected a fee. Stated more simply, these two rules preclude recovery where the benefit is officiously or gratuitously conferred.
>
> * * * * *

> "Officiousness" is a term traditionally used to describe interference in the affairs of others that is not justified under the circumstances. FARNSWORTH, CONTRACTS § 2.20, at 100 (1982).

Biggerstaff v. Vanderburgh Human Soc., Inc., 453 N.E.2d 363, 364 (Ind. Ct. App. 1983) (footnote and some citations omitted, emphasis added).

The record is vague as to the terms of the agreement concerning the remodeling. However, it is clear the Madisons still owned the property at the time and Kevin controlled who could work on the property. The Gieses did not begin working until Kevin gave them permission. Kevin presumably knew what work was being done on the property, as he obtained an electrician and plumber and paid for some of the work. Thus, the Madisons seem to have consented to the work, and it was not done "gratuitously" or "officiously." The Gieses would have become owners of the property had the Madisons not unreasonably delayed the closing. As the Madisons did not close on the property, they had reason to believe the Gieses would expect reimbursement for the work done.[8] *Cf. id*. at 364-65 (Where Biggerstaff obtained a court order preventing the Humane Society from euthanizing certain dogs or allowing them to be adopted, Humane Society was entitled to payment from Biggerstaff for the dogs' care.). Therefore, we conclude the trial court did not err by

[8] The Madisons further argue the Gieses had unclean hands because the Gieses did not tell them they were looking at other properties and acted as though they still wanted to close on the Madisons' property. As explained above, the trial court faulted the Madisons for the failure to close, and the Gieses notified the Madisons no later than December 5, 2006, that they wanted to rescind the contract.

The Madisons also argue that rather than entitling the Gieses to damages for unjust enrichment, the changes the Gieses made entitle the Madisons to hold the Gieses to the contract. They rely on *Standard Oil Co. v. Rice*, 195 Ind. 653, 145 N.E. 786 (1924). This argument is raised for the first time in the reply brief; therefore it is waived. Ind. Appellate Rule 46(C); *Cain v. Back*, 889 N.E.2d 1253, 1259 n.6 (Ind. Ct. App. 2008), *trans. denied*. In any event, *Standard Oil Co*. is distinguishable because the seller in that case was not at fault for failing to close the deal.

awarding the Gieses damages for the improvements they made to the property.

The judgment of the trial court is affirmed.

Affirmed.

KIRSCH, J., and DARDEN, J., concur.