MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Cross DeBoer LLC,
Appellant-Defendant,

v.

Micol Seigel,
Appellee-Plaintiff.

December 7, 2022

Court of Appeals Case No. 22A-PL-1214

Appeal from the Monroe Circuit Court

The Honorable Holly M. Harvey, Judge

Trial Court Cause No. 53C06-2006-PL-1010

Mathias, Judge.

[1] Cross DeBoer LLC ("Cross DeBoer") appeals the Monroe Circuit Court's judgment for Micol Seigel on Seigel's complaint seeking the return of earnest

money she paid to Cross DeBoer for the purchase of a house. Cross DeBoer presents three issues for our review:

I. Whether the trial court erred when it found that Seigel did not breach the parties' purchase agreement.

II. Whether the trial court erred when it refused to enforce a liquidated damages provision in the purchase agreement.

III. Whether the trial court erred when it did not award attorney's fees to Cross DeBoer.

[2] We affirm.

Facts and Procedural History

[3] Reynard Cross and Stephanie DeBoer are married and are members of Cross DeBoer, a real estate management and development company. In late 2019, Seigel, Reynard, and Stephanie were friends. Reynard bought a house at 938 N. Jackson Street in Bloomington ("the house") and began renovating it with the intention to place it for rent. But Reynard decided to sell the house in November, and Seigel expressed an interest in buying it. Reynard had not yet completed certain finishes in the house, and he allowed Seigel to choose finishes like tile, countertops, and paint colors in anticipation of her purchase of the house. Seigel also requested certain "improvements and enhancements" to the house, for which she paid $2528 to Reynard in advance. Appellant's App. Vol. 2, p. 15.

[4] In early December, Reynard provided Seigel with a draft purchase agreement. Seigel wanted to change some of the terms and gave Reynard notes regarding substantive changes she wanted to make to the agreement. On December 23, Reynard and Seigel met in person to discuss the terms of the draft purchase agreement. Reynard did not make all of the changes Seigel wanted, but they executed the purchase agreement that day. The executed purchase agreement provided in relevant part as follows:

> 3. Purchase Price. The total purchase price for the Property is $325,000.00. Buyer will pay $32,500.00 (the "Earnest Money") upon the execution of this Agreement and then pay the remaining $292,500.00 of the purchase price at closing.
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> 13. Buyer Contingencies
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> a. Financing: Third-Party Lender. Unless waived by Buyer in writing, this Agreement is contingent on Buyer's ability to obtain a financing commitment from an institutional third-party lender on or before 20 January 2020 (the "Financing Contingency Date"). The loan must finance at least 80% of the purchase price unless Buyer has sufficient funds by the Contingency Date; however, if Buyer is nonetheless unable to secure such financing, this Agreement will be canceled and the Earnest Money and all other deposits will be refunded to the respective Parties with Buyer paying the costs of restoring the Property to its former condition; the condition before the customizations which were requested by the Buyer were made by the Seller to

the Buyer's specifications. The costs of the restoration are listed at Paragraph 26.

* * *

19. Default and Remedies. Upon Seller's default of this Agreement, Buyer will be entitled to either (a) cancel this Agreement and have the Earnest Money and all other deposits refunded to the respective Parties, or (b) pursue any remedy available by law or equity, including seeking specific performance. *Upon Buyer's default of this Agreement*, Seller will be entitled to cancel this Agreement, keep a portion of the Earnest Money equal to the costs of restoring the Property to its former condition; *the condition before the customizations which were requested by the Buyer were made by the Seller to the Buyer's specifications (The costs of the restoration are listed at Paragraph 26) as liquidated damages*, and have all other deposits returned to the respective Parties. In addition, *if any action at law or in equity is brought to enforce or interpret this Agreement, the Seller will be entitled to compensation from the Buyer for all attorneys' fees and costs*.

* * *

26. Additional Terms. The Parties agree to the following additional terms, conditions, and/or disclosures:

a. If, under any of the circumstances stated in this Agreement, the Buyer is unable to, or chooses not to complete the purchase of the property, the Buyer agrees to paying over to the Seller, the sum of $23,800.00, which is the costs [sic] of restoring the Property to its former condition; the condition before the customizations which were requested by the Buyer were made by the Seller to the Buyer's specifications:

Repaint Interior Walls	$6[,]000.00
Bathrooms	$15,400.00

Kitchen Counters $2,400.00

Id. at 16-27 (emphases added).

[5] The purchase agreement also included a "leaseback provision" whereby, at closing, the parties agreed to execute a lease agreement "for Seller to immediately lease Property back from Buyer at $1,300.00 per month payable monthly commencing on the date of closing and ending on 31 July 2020." *Id.* at 17. That provision "changed the nature of the purchase agreement" such that Seigel could not obtain a residential loan to purchase the house. Tr. p. 21. Rather, she had to qualify for a commercial loan, which she could not do. When Seigel told Reynard about the issue, he agreed to amend the purchase agreement to remove the leaseback provision. But he also asked her to agree to lease the house to him despite the lack of provision in the agreement. Seigel did not agree to that arrangement.

[6] Still, Seigel continued to express her desire to buy the house, and on January 16, 2020, she submitted an executed amended purchase agreement to Reynard that eliminated the leaseback provision. Reynard proposed changes to that amended purchase agreement. Seigel did not sign his proposed amended purchase agreement because she did not agree with some of the new terms. Seigel told Reynard that she could not get approval for a mortgage without an appraisal, and she could not get an appraisal without a purchase agreement. Seigel asked Reynard to approve an amended purchase agreement with terms acceptable to her, but he refused.

[7] In an email to Seigel dated January 29, Reynard stated in relevant part:

> Given the terms of the contract, since you have not accepted the amendment to the Purchase Agreement dated 26 January 2020, I am able to enforce the provisions of Paragraph 13.a. and Paragraph 19 of the Agreement which stated that I keep a portion of the Earnest Money equal to $23,800.00. The balance of the earnest money will be returned to you less any amount still owed to me for customizations which you requested. However, I am willing to make one final attempt to come to an agreement (see below).
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> * * *
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> I am willing to enter into a new contract under new terms; terms that are in keeping with the standard real estate purchase agreement. This offer is made with the hope that we can arrive at a solution where I do not have to use approximately $24K of the earnest to refit the house. What I am not prepared to do is to put myself into a disadvantageous position. Therefore, with the exception of a change in the financing contingency date, no other allowances will be given. My offer to enter into a new contract expires at 5:00pm on Wednesday 29 January 2020. This is my final offer.

Appellant's App. Vol. 2, pp. 80-81. In response, Seigel offered to meet with Reynard to come up with a new purchase agreement they could all agree on.

[8] On February 2, Reynard sent Seigel a revised purchase agreement by email with new terms. Reynard stated that Seigel was "in breach" of two provisions of the purchase agreement; that "the previous contract is cancelled"; and that he had "enforced the provisions of Paragraph 13.a. and Paragraph 19 of the Agreement which stated that I keep a portion of the Earnest Money equal to $23,800.00."

Id. at 83. But Reynard expressed his willingness to "enter into a new contract under new terms[.]" *Id.* Reynard set out those new terms, and he ended the email by stating, "This is my final offer—take it or leave it." *Id.* at 84. Reynard advised Seigel that if he did not hear from her by 4:00 p.m. on February 3, he would "proceed to return the balance of [her] funds to [her]." *Id.* Seigel did not accept the new terms. Reynard did not return any money to Seigel.

[9] On June 17, Seigel filed a complaint alleging that Cross DeBoer had not given her a seller's disclosure form and that the parties' purchase agreement was, as a result, terminated. Seigel alleged that she was entitled to the earnest money under the terms of the purchase agreement and that Cross DeBoer was unjustly enriched in the amount of $2,528, which she had paid for certain improvements to be made to the house in advance of the sale. In its answer, Cross DeBoer asserted several affirmative defenses, including its allegation that Seigel "was first to breach the Real Estate Purchase Agreement." *Id.* at 32.

[10] Following a bench trial in April 2021, the trial court found and concluded in relevant part that Seigel did not prove that Cross DeBoer failed to give her a seller's disclosure form and there was "insufficient evidence to set aside" the purchase agreement "as an enforceable contract." *Id.* at 36. The court concluded as follows:

> To the extent that [Cross DeBoer] is retaining the earnest money for [Seigel's] failure to proceed on the Agreement, [Cross DeBoer] is ordered to return the funds. [Cross DeBoer] is ordered to submit to [Seigel], through counsel, an itemization of the amounts due for [Seigel's] failure to complete the Agreement, as

> outlined therein. In itemizing the costs, [Cross DeBoer] is not entitled to recover attorney's fees. In the event of a dispute in the amounts owed to [Seigel], the Court will set a hearing on request.

Id. After the parties could not agree on the amount owed to Seigel, Cross DeBoer filed a verified request for notice of satisfaction with the trial court and Seigel filed a motion for entry of judgment. On January 13, 2022, the trial court held a hearing on the parties' motions and found and concluded as follows:

> 1. [Cross DeBoer] is holding the earnest money paid by [Seigel] in the amount of $32,500 with the intent to purchase the Real Estate. The Earnest Money was nonrefundable unless an exception applied under the Purchase Agreement.
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> 2. The Court has held that the Purchase Agreement is a valid and enforceable contract.
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> 3. The Agreement provides that in the event of the Seller's default, the Seller must return the Earnest Money to the Buyer, and in the event of Buyer's default, the Buyer is entitled to a refund of the earnest money minus the costs of restoring the property to the original planned condition before the upgrades requested by [Seigel]. *There has been no finding in prior orders regarding breach of the contract by either party*.
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> 4. Under the "Additional Terms" of the Agreement, if, "under the circumstances stated in this Agreement, the Buyer is unable to, or chooses not to complete the purchase of the property, the Buyer agrees to paying over to the Seller, the sum of $23,800.00, which is the costs of restoring the Property to its former condition; the condition before the customizations which were requested by the Buyer were made by the Seller to the Buyer's specifications" for "repainting" interior walls,

"bathrooms" and "kitchen counters," in a total amount of $23,800.00.

5. [Cross DeBoer] asserts that the $23,800 is liquidated damages for [Seigel's] failure to perform the contract. The reference to the term as liquidated damages in the Agreement is not dispositive. In order to enforce the amount as liquidated damages, the Court must find a proportionality between the loss and the sum established as liquidated damages. *Dean V. Kruse Found., Inc. v. Gates*, 973 N.E.2d 583, 593 (Ind. Ct. App. 2012)[, *trans. denied*]. If the sum is not greatly disproportionate to the loss likely to occur or the loss sought to be avoided, the provision will be accepted as a liquidated damages clause and not as a penalty. *Id.* However, if the sum sought to be fixed is grossly disproportionate to the loss which may result from the breach, courts will treat the sum as a penalty rather than as liquidated damages. *Id.* at 593-94 (Ind. Ct. App. 2012). In addition, the Court compares the proportion of the amount claimed as liquidated damages with the amount of loss likely to occur in the event of breach. *Id.*

6. *The Court declines to enforce the $23,800 as liquidated damages, which is consistent with prior orders. The Court has not found either party to have breached*. [Cross DeBoer] has retained the property and earned rental income and listed the property for sale at a price $100,000 higher than the original purchase price. Retention of the $23,800 compared to the increased value of the house supports the conclusion that the $23,800 is a penalty. In addition, as [Seigel] has argued, the measure of damages for a breach of the agreement is readily ascertainable by the difference in fair market value and purchase price should be property be sold at a loss.

7. Additional evidence submitted in the case establishes that [Cross DeBoer] has not expended any funds to undo or restore the property to its previous conditions prior to the renovations

> requested by [Seigel], aside from the $760 painting cost. Cross[DeBoer] should recover those costs as an itemized cost.
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> 8. The Court will not award [attorney's] fees to either party. Court orders judgment to [Seigel] in the amount of $31,740, to be paid within thirty days of this Order.

Id. at 12-13 (emphases added). This appeal ensued.

Discussion and Decision

Issue One: Breach of Contract

[11] Cross DeBoer first contends that the trial court erred when it did not find that Seigel breached the purchase agreement. In awarding damages to Seigel after the bench trial, the court entered findings and conclusions under Indiana Trial Rule 52(A). These findings, and the judgment, will not be set aside unless clearly erroneous, and due regard shall be given to the trial court's opportunity to judge witness credibility. *Bruder v. Seneca Mortg. Servs., LLC*, 188 N.E.3d 469, 471 (Ind. 2022).

[12] Cross DeBoer asserts that "the evidence in the record establishes a breach by Ms. Seigel and [the] trial court was clearly erroneous in not finding that Micol Seigel breached the purchase agreement." Appellant's Br. at 8. In support, Cross DeBoer states, without relevant citation to the record, that Seigel "failed to procure financing by January 20, 2020," and "failed to make a good-faith effort to procure it." *Id.* Because Cross DeBoer does not support those bare assertions with citations to the record, the issue is waived. *See* Ind. Appellate Rule 46(A)(8)(a). Waiver notwithstanding, Cross DeBoer's contention amounts

to a request that we reweigh the evidence, which we cannot do. Cross DeBoer has not shown that the trial court clearly erred when it found that Seigel did not breach the purchase agreement.[1]

Issue Two: Liquidated Damages

[13] Cross DeBoer next contends that the trial court erred when it found that the liquidated damages provision of the purchase agreement was a penalty and declined to enforce it. "'The question whether a liquidated damages clause is valid, or whether it constitutes a penalty, is a pure question of law for the court.'" *Gates*, 973 N.E.2d at 590 (quoting *Gershin v. Demming*, 685 N.E.2d 1125, 1128 (Ind. Ct. App. 1997)).

[14] A liquidated damages clause provides for the forfeiture of a stated sum of money upon a breach of contract without proof of damages. *Id.* at 591. While liquidated damages clauses are ordinarily enforceable, contractual provisions constituting penalties are not. *Id.* To determine whether a stipulated sum payable upon breach of contract constitutes liquidated damages or a penalty,

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[1] We note that paragraph 13 of the purchase agreement includes a financing contingency, whereby Seigel's failure to secure financing by January 20, 2020, despite a good faith effort to do so would terminate the agreement and return the earnest money to Seigel, minus "the costs of restoring the Property to its former condition" as set out in paragraph 26 of the purchase agreement. Appellant's App. Vol. 2, p. 20. Cross DeBoer makes no argument on appeal that it is entitled to those restoration costs because the contingency was not satisfied. Rather, its sole argument is that Seigel *breached* the purchase agreement when she failed to obtain financing. "A court which must . . . make up its own arguments because a party has not adequately presented them runs the risk of becoming an advocate rather than an adjudicator." *Young v. Butts*, 685 N.E.2d 147, 151 (Ind. Ct. App. 1997) (citing *Keller v. State*, 549 N.E.2d 372, 373 (Ind. 1990)). A brief should not only present the issues to be decided on appeal, but it should be of material assistance to the court in deciding those issues. *Id.* Accordingly, here, we address only Cross DeBoer's argument that Seigel breached the purchase agreement.

the facts, the intention of the parties, and the reasonableness of the stipulation under the circumstances of the case are all to be considered. *Id.*

[15] A party seeking to enforce a liquidated damages provision must demonstrate some proportionality between the loss and the sum established as liquidated damages. *Id.* at 593. If the sum is not greatly disproportionate to the loss likely to occur or the loss sought to be avoided, the provision will be accepted as a liquidated damages clause and not as a penalty. *Id.* However, if the sum sought to be fixed is grossly disproportionate to the loss which may result from the breach, courts will treat the sum as a penalty rather than as liquidated damages. *Id.* at 593-94.

[16] Here, again, the trial court found that neither party breached the purchase agreement. Without a breach, there can be no liquidated damages.[2] *See id.* at 591. In any event, to the extent that the trial court found that the liquidated damages clause was a penalty, the evidence supports that finding. Seigel presented expert testimony to show that the customizations she requested were "high-quality," marketable finishes that improved the house, and the photographic exhibits corroborate that testimony. Tr. p. 189. Indeed, without having made changes to the house other than some repainting, Cross DeBoer has rented the house and listed it for sale at $100,000 more than the purchase

[2] Cross DeBoer makes no argument on appeal that it is entitled to the restoration costs under paragraph 13 due to Seigel's failure to secure financing. Rather, Cross DeBoer's sole argument is that it is entitled to liquidated damages due to Seigel's alleged breach.

price in the parties' purchase agreement. The trial court did not err when it found Cross DeBoer's alleged damages to be disproportionate to its actual damages. *See Gates*, 973 N.E.2d at 593.

Issue Three: Attorney's Fees

[17] Finally, Cross DeBoer contends that the trial court erred when it denied its request for attorney's fees. In support, Cross DeBoer asserts that it was entitled to attorney's fees under paragraph 19 of the purchase agreement, which provides that "if any action at law or in equity is brought to enforce or interpret this Agreement, the Seller will be entitled to compensation from the Buyer for all attorneys' fees and costs." Appellant's App. Vol. 2, p. 26. We cannot agree.[3]

[18] As this Court has held, "[a] contractual provision agreeing to pay attorney fees is enforceable if the contract is not contrary to law or public policy." *Carter-McMahon v. McMahon*, 815 N.E.2d 170, 178 (Ind. Ct. App. 2004) (citation omitted). Here, the trial court found that the purchase agreement "is a valid and enforceable contract." Appellant's App. Vol. 2, p. 12. However, taken in the context of paragraph 19 of the purchase agreement, Cross DeBoer is only entitled to attorney's fees if one of the parties breached the agreement. Because there was no breach, the trial court did not err when it denied Cross DeBoer's attorney's fee request.

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[3] Seigel contends that Cross DeBoer raises this issue for the first time on appeal, and it is waived. But, following the January 13, 2022, hearing, the trial court expressly granted Cross DeBoer one week to submit a trial brief on this issue, and Seigel did not object.

[19] Affirmed.

Robb, J., and Foley, J., concur.