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IN THE
COURT OF APPEALS OF INDIANA

GAIA WINES, INC., and ANGEE D. WALBERRY,

Appellants/Defendants/Counterclaim Plaintiffs/Counterclaim Defendants,

and

MARGARET BRODERICK,

Appellant/Defendant/ Counterclaim Plaintiff,

vs.

HEARTLAND COMMUNITY BANK,

Appellee/Plaintiff/ Counterclaim Defendant,

and

NORMAN GALLIVAN, INC.,

Appellee/Counterclaim Defendant/ Counterclaim Plaintiff.

No. 49A04-0712-CV-680

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Gary L. Miller, Judge
Cause No. 49D05-0303-CT-588

September 26, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellants/Defendants/Counterclaim Plaintiffs/Counterclaim Defendants Gaia Wines, Inc., and Angee Walberry and Appellant/Defendant/Counterclaim Plaintiff Margaret Broderick ("the Gaia parties") appeal from the trial court's denial of their motion to correct error. The trial court's denial followed its denial of the Gaia parties' motion for stay and to void their settlement agreement ("the Agreement") with Appellee/Plaintiff/Counterclaim Defendant Heartland Community Bank and Appellee/Counterclaim Defendant/Counterclaim Plaintiff Norman Gallivan, Inc., and the trial court's grant of Appellees' motion to enforce the Agreement. We reorder and restate the issues raised as follows:

I. Whether this court has jurisdiction over this appeal, and, if so, over which parties;

II. Whether this court will entertain arguments based on trial court orders not listed in the notice of appeal;

III. Whether the trial court abused its discretion in granting Appellees' motion to enforce the Agreement.

We dismiss in part and affirm in part.

FACTS AND PROCEDURAL HISTORY

Gaia Wines began operations in May of 1996 as an Indianapolis-based winery and was owned by Walberry and managed by Broderick. At certain times, Bank One lent money to Gaia, which loans were eventually assigned to Heartland. The Small Business Administration ("the SBA") guaranteed one of the loans, and, in addition, Walberry executed two mortgages on her home to further guarantee the loans.

Gaia eventually became delinquent on its loan payments, and, on March 28, 2003, Heartland sued Gaia, Walberry, and the SBA, seeking judgment in the amount owed on the loans, foreclosure of its security interests, enforcement of Walberry's guarantees of the loans, a temporary restraining order preventing dispersal of collateral, and immediate possession of collateral. At some point, Heartland engaged Gallivan to assist in the liquidation process, and Gaia's assets were eventually sold and/or auctioned for between approximately $8000 and $12,000.

On June 22, 2005, the Gaia parties countersued Heartland, contending, *inter alia*, that it had breached a $775,000 loan agreement and an asset liquidation agreement. The Gaia parties also sued Gallivan, contending that it had liquidated Gaia's inventory in a commercially unreasonable manner. On August 30, 2005, Gallivan countersued Gaia and Walberry, alleging their suit against him to be frivolous.

After Gallivan moved for summary judgment, the case went to mediation. On November 13, 2006, the parties entered into the Agreement, which provided, in relevant part, as follows:

> On November 13, 2006, the case Heartland Community Bank v. Gaia Wines, Inc., et al., Cause No. 49D05-0303-CT-588 was mediated to settlement pursuant to the following terms: In exchange for a full and complete mutual release, to be signed by all parties,
>
> 1. Within 30 days after all contingencies are met, Heartland Community Bank agrees to (1) pay to Angee Walberry and Auger and Auger[1] $160,422.25; and (2) release all obligations and mortgages to Heartland Bank with regard to Walberry's residence.
>
> ….
>
> 4. Norm Gallivan, Inc., shall make a payment to Angee Walberry and Auger and Auger of $5,000.00 within 60 days from the date of this agreement.
>
> This settlement is contingent upon Heartland reaching a resolution on defendants' loan with the SBA that is acceptable to Heartland. The determination of whether this contingency is met shall be at the sole discretion of Heartland.
>
> Gaia, Walberry and Broderick agree to fully cooperate with Heartland in Heartland's efforts to reach an acceptable solution with the SBA. Such cooperation shall include, but shall not be limited to, completing and executing appropriate documentation regarding Gaia's and Walberry's financial status.

Appellant's App. pp. 473-74.

A few days later, Heartland had Walberry review and sign an "Offer in Compromise" that the SBA required. This first offer from the SBA would have released Walberry from "the second mortgage on [her home] and a release of her personal guaranty of the obligations of Gaia Wines, Inc." Appellant's App. p. 432. In the offer, Walberry also represented that she was "unable to make any payment to the SBA at the present time[.]" Appellant's App. p. 432.

Apparently, the SBA was unwilling to release Gaia and Walberry without receiving some payment. On March 14, 2007, Heartland forwarded a revised offer to

[1] Auger and Auger was the Gaia parties' law firm at the time. (Appellant's App. 474).

Walberry. The revised offer provided that the SBA would have released Walberry from the second mortgage on her home and her personal guaranty in exchange for $10,000, which was to be paid by Heartland. The revised offer provided that Walberry was "not in a position to make any personal payment to the SBA" but omitted the "at the present time" language. Appellant's App. p. 433.

On March 28, April 17, and May 7, 2007, Heartland emailed Walberry's counsel, asking whether she would sign and return the revised offer. On May 7, 2007, Walberry's counsel replied that Walberry was unwilling to sign the revised offer and that he was withdrawing as counsel for the Gaia parties. On June 22, 2007, the Gaia parties filed a motion to invalidate the Agreement on the basis that Heartland had failed to satisfy the contingency that it reach an acceptable agreement with the SBA regarding its loan to Gaia.

On July 19, 2007, Heartland filed a motion to enforce the Agreement, in which it contended that it had successfully reached a resolution of the issue with the SBA that did not require Walberry to execute the revised offer. At a hearing on August 29, 2007, Heartland's counsel claimed that his client had reached an agreement with the SBA such that Heartland was now free to release any liens in this matter in exchange for a $10,000 payment to the SBA.

On August 31, 2007, the trial court granted Heartland's motion to enforce the Agreement, in an order that provided, in relevant part, as follows:

> 1) A settlement agreement was mediated and signed by all parties pursuant to Indiana Mediation Rule 2.7 on November 13, 2006.

2) Part of the agreement was an obligation that Heartland reach a resolution on the Defendant's loan with the SBA that was acceptable to Heartland.
3) There was delay in obtaining that resolution but in May of 2007, Heartland reached an accord with the SBA.
4) Since that time, there has been a good faith basis by the Defendants to challenge the condition precedent contained in the mediated agreement as no evidence of a writing has ever been tendered evidencing the SBA's decision to accept the terms of the settlement.
5) At the hearing on these matters, counsel for the Plaintiff represented to the Court that the SBA had accepted the settlement in return for $10,000 to be paid by the Plaintiff, which payment was made several months earlier. Other than a letter from Plaintiff's counsel to the SBA, there is no other written evidence of the settlement with the SBA.

….

8) Based on the representations of Plaintiff's counsel, this Court is satisfied that there has been a resolution of the Defendant's loan with the SBA.
9) The Court finds that the settlement agreement of November 13, 2006 be enforced. The parties have fourteen days from the date of this order to comply with the settlement agreement. There is no basis at the current time to award attorney fees to either side.

Appellant's App. pp. 32-33.

On September 28, 2007, the Gaia parties filed a motion to correct error, contending that the trial court wrongly ordered the Agreement enforced because Heartland had not satisfied the condition precedent of reaching an accord with the SBA within a reasonable time. The Gaia parties contended that allegedly newly-discovered evidence, in the form of a July 12, 2007, letter from the SBA to Heartland's counsel, established that Heartland did not satisfy the condition precedent until that date, as opposed to in May of 2007, as the trial court found.

On October 8, 2007, the trial court denied the Gaia parties' motion to correct error. On October 22, 2007, Walberry and Broderick, now apparently without counsel, filed a

pro se "First Amended Motion to Correct Errors Based on Newly Discovered Evidence Subject to Trial Rule 60," which motion the trial court denied the next day. On November 7, 2007, Walberry and Broderick filed a *pro se* "Second Amended Motion to Correct Errors[,]" which the trial court denied that day.

Also on November 7, 2007, a notice of appeal was submitted and signed by Walberry, *pro se*. The notice of appeal purported to give notice on behalf of Gaia and Broderick as well. The notice of appeal specifically gave notice of an appeal from the trial court's August 31, 2007, order granting Heartland's motion to enforce the Agreement and the trial court's October 8, 2007, denial of the Gaia parties' original motion to correct error, but did not mention the trial court's denial of the first amended or second amended motions to correct error.

At some point, the Gaia parties obtained counsel who made an appearance in this court. On December 7, 2007, the Gaia parties filed their case summary, in which they expressed a desire to appeal from the trial court's August 31, 2007, ruling and the denial of the first amended motion to correct error on October 23, 2007. On February 18, 2008, Heartland filed a motion to dismiss the appeal. On March 17, the motions panel of this court ruled that Heartland's motion to dismiss would be held in abeyance, to be ruled upon by the writing panel to which the appeal was assigned.

DISCUSSION AND DECISION

I. Heartland's Motion to Dismiss

Heartland's motion to dismiss this appeal is based on its contention that the Gaia parties' notice of appeal is a nullity. Heartland notes that Walberry alone signed the

notice and argues that, not only does the notice therefore not preserve Gaia's and Broderick's appellate rights, it is ineffective even as to Walberry. We are persuaded by neither of Heartland's arguments.

A. Walberry's Appellate Rights

Heartland contends that Walberry's signing of the notice of appeal on behalf of Gaia and Broderick renders the entire notice a nullity, ineffective even as to Walberry's appellate rights. Although the parties point us to no authority directly on point, Heartland argues that allowing Walberry's appeal to proceed would be to condone the unauthorized practice of law. While this might be true in some contexts with regard to persons or entities other than Walberry, we fail to see how allowing her to represent herself would have this effect. Walberry has not held herself out to be an attorney, nor is there any indication that she has profited from her "representation" of Gaia and Broderick.

Heartland relies on *Midwest Home Savings and Loan Association v. Ridgewood, Inc.*, 463 N.E.2d 909 (Ill. Ct. App. 1984), in which the court concluded that a notice of appeal by the corporate appellant was invalid when signed only by the corporation's non-attorney secretary. *Id*. at 912. *Midwest Home*, however, is distinguishable, because the secretary's appellate rights were not at issue, only the corporation's. In the end, *Midwest Home* does not stand for the proposition that a non-attorney necessarily forfeits her appellate rights if, in the same case, she also attempts to exercise the appellate rights of others. We conclude that the notice of appeal filed in this case was effective to preserve Walberry's appellate rights.

B. Gaia's and Broderick's Appellate Rights

Heartland also contends that Walberry's signing of the notice of appeal is ineffective as to Gaia and Broderick. Indiana Appellate Rule 17(A), however, provides that "a party of record in the trial court or Administrative Agency shall be a party on appeal." It follows, then, that if any party has properly perfected an appeal, all other parties below are parties to that appeal. The Indiana Supreme Court interpreted the predecessor to Appellate Rule 17(A) to "operate[] of its own force to make all parties in the trial court parties on appeal, whether such parties actively participate or not." *State v. Nixon*, 270 Ind. 192, 194, 384 N.E.2d 152, 153 (1979). Because Walberry's notice of appeal was effective as to her, it was also effective as to Broderick and Gaia.[2]

II. Scope of the Notice of Appeal

Appellate Rule 9(F)(1) provides that "[t]he Notice of Appeal shall designate the appealed judgment or order and whether it is a final judgment or interlocutory order." Heartland notes that the Gaia parties' notice of appeal mentions only the trial court's August 31, 2007, order granting Heartland's motion to enforce the Agreement and the trial court's October 8, 2007, denial of the Gaia parties' motion to correct error and contends that our review is limited to those items. For their part, the Gaia parties urge us to ignore the plain language of the rule, arguing that enforcement of the rule as written could potentially be burdensome in some cases. The Gaia parties, however, provide no authority for the proposition that we are free to ignore the plain language of the rule, even if doing so might avoid harsh results in some cases. We decline to depart from the rule as

[2] We would note that inclusion of Broderick and Gaia does not appear to alter our evaluation of the merits of the appeal. To the extent that their rights and obligations under the Agreement differ from Walberry's, they are not at issue in this appeal.

written, and, consequently for the Gaia parties, there is simply no way around the word "shall."[3] Our review is therefore limited to the trial court's original order and its order denying the Gaia parties' first motion to correct error. To the extent that the Appellants' Brief raises and develops arguments relating to the first or second amended motions to correct error, those sections are stricken.

III. Whether the Trial Court Erred in Granting Heartland's Motion to Enforce the Agreement

"Indiana strongly favors settlement agreements." *Georgos v. Jackson*, 790 N.E.2d 448, 453 (Ind. 2003) (citing *Scott v. Randle*, 697 N.E.2d 60, 65 (Ind. Ct. App. 1998)). "And it is established law that if a party agrees to settle a pending action, but then refuses to consummate his settlement agreement, the opposing party may obtain a judgment enforcing the agreement." *Id*. (citing *Klebes v. Forest Lake Corp.*, 607 N.E.2d 978, 982 (Ind. Ct. App. 1993); *Brant Constr. Co. v. Lumen Constr. Inc.*, 515 N.E.2d 868, 876 (Ind. Ct. App. 1988)). "Settlement agreements are governed by the same general principles of contract law as any other agreement." *Id*. (citing *Ind. State Highway Comm'n v. Curtis*, 704 N.E.2d 1015, 1018 (Ind. 1998)).

The Agreement itself does not have a provision specifying a performance date by any party. "When the parties to an agreement do not fix a concrete time for performance, the law implies a reasonable time." *Harrison v. Thomas*, 761 N.E.2d 816, 819 (Ind. 2002) (citing *Epperly v. Johnson*, 734 N.E.2d 1066, 1072 (Ind. Ct. App. 2000)). "What

[3] Even if we *were* inclined to ignore the plain language of the rule, there is no indication that adding the first and second amended motions to correct error would have been unduly burdensome for the Gaia parties.

constitutes a reasonable time depends on the subject matter of the contract, the circumstances attending performance of the contract, and the situation of the parties to the contract." *Id*. (citing *Epperly*, 734 N.E.2d at 1072). "It is an issue of fact." *Id*. (citing *In re Estate of Moore*, 714 N.E.2d 675, 677 (Ind. Ct. App. 1999)).

Here, in its order granting Heartland's motion to enforce the Agreement, the trial court did not make any findings regarding whether Heartland performed within a reasonable time. "[S]pecial findings entered by the trial court sua sponte control only as to the issues they cover." *Id*. (citing *Moore v. Moore*, 695 N.E.2d 1004, 1008 (Ind. Ct. App. 1998)). "As to issues on which the trial court has not made findings, or on which the findings are inadequate, we treat the judgment as a general one and we examine the record and affirm the judgment if it can be sustained upon any legal theory the evidence supports." *Id*. (citing *Moore*, 695 N.E.2d at 1008). "In the review, we neither weigh the evidence nor judge witness credibility. *Id*. (citing *Moore*, 695 N.E.2d at 1008).

The Gaia parties contend that the trial court erroneously found that Heartland performed within a reasonable time. Specifically, the Gaia parties make much of the trial court's findings that (1) at least as of August 29, 2007, there existed no documentary evidence of the accord and (2) the accord between the SBA and Heartland was reached in May of 2007. The first finding was apparently based on Heartland's attorney's representation that they did not have "anything in writing" regarding the accord. Tr. p. 23. As it happened, of course, there *was* documentary evidence of the accord. What we fail to see, however, is how Heartland's alleged misrepresentation on this point could have harmed the Gaia parties, in that a lack of documentary evidence of the accord could

only have tended to weaken Heartland's argument that the accord existed. As for the second finding, the record contains no evidence that the SBA and Heartland reached an accord in May of 2007, only that they were negotiating in May of 2007. As such, the finding is clearly erroneous and we will assume for purposes of disposing of this appeal that the accord was reached on the earliest date supported by the record–July 12, 2007.

In the end, even if the trial court determined that Heartland's performance was timely solely because it occurred in May of 2007, we would still affirm the trial court's judgment if the record supports a finding that a July 12, 2007, performance was reasonably timely. "[I]t is well established that a decision of the trial court will be sustained if a valid ground exists to support it, whether or not the trial court considered those grounds." *Bruce v. State*, 268 Ind. 180, 201, 375 N.E.2d 1042, 1054 (1978). "[I]n reviewing a judgment on appeal it is the duty of [this] Court to sustain the action of the trial court if it can be done on any legal ground on the record." *Cain v. State*, 261 Ind. 41, 45-46, 300 N.E.2d 89, 92 (1973). "This is true even though the reason given by the trial court might be erroneous, if the ruling can be sustained on another ground." *Id*. at 46, 300 N.E.2d at 92. "[I]f the ruling of the trial court is correct, his stated reason therefor is of no consequence." *Hyde v. State*, 451 N.E.2d 648, 650 (Ind. 1983).

The question before us, then, is whether the record would support a finding that Heartland fulfilled its obligations under the agreement in a reasonable time under the circumstances of the case, regardless of the trial court's actual findings. The record indicates that the Agreement was signed on November 13, 2006. On November 17, 2006, Walberry signed the first offer in compromise to be forwarded to the SBA.

Counsel for Heartland received the offer on November 27, 2006, and it was forwarded to the SBA. Ultimately, the SBA was unwilling to release Gaia and Walberry unless it received payment in return and requested a new appraisal of Walberry's residence. The appraisal was performed in January of 2007.

On March 14, 2007, Heartland sent the second proposed offer of settlement with the SBA to Walberry. Although the record is silent regarding responsibility for some of the delay to March of 2007, Walberry does not argue that any of it was caused by intransigence on Heartland's part. On March 28, 2007, April 17, 2007, and May 7, 2007, Heartland's counsel sent e-mails to Walberry's counsel, requesting status updates. Finally, on May 7, 2007, Walberry's counsel replied that he was withdrawing and that Walberry was unwilling to sign the second offer. Over the course of approximately the next two months, Heartland ultimately, on July 12, 2007, reached an accord with the SBA that did not require Walberry to submit an offer in compromise.

Overall, we conclude that the record before us would have supported a finding that Heartland exercised reasonable diligence in reaching an accord with the SBA. Within days of signing the Agreement, Heartland provided Walberry with a proposed offer in compromise to be forwarded to the SBA. Although the record does not disclose precisely when the SBA notified Heartland that the first offer would be unacceptable, a second appraisal of Walberry's residence occurred in January of 2007, which appraisal occurred at the SBA's request. Following the reappraisal, Heartland submitted a second proposed offer in compromise on March 14, 2007. In the absence of any evidence that the delay from January to mid-March was unreasonable under the circumstances, we will not

charge it to Heartland. Indeed, the Gaia parties do not argue that this delay should be charged to Heartland.

Following submission of the second offer to Walberry, Heartland made three inquiries over the next fifty-four days, only to be finally informed on May 7, 2007, that Walberry would not sign the second offer. At that point, the record indicates that Heartland entered into negotiations with the SBA, finally reaching an accord on July 12, 2007, one that did not require Walberry to submit an offer in compromise. While Walberry's refusal to sign the second offer may well have been in good faith, we think the record would support a finding that any delay from March 14, 2007, to July 12, 2007, was nonetheless directly attributable to either her decision not to sign the offer or her delay in communicating that decision to Heartland. Based on the record before us, we cannot say that a delay from November 13, 2006, to July 12, 2007, was unreasonable as a matter of law, especially when the litigation had already been ongoing for over three and one-half years when the Agreement was reached. Because we conclude that the record would have supported a finding that Heartland performed in a reasonable time, we therefore affirm the trial court's grant of Heartland's motion to enforce the Agreement and its denial of the Gaia parties' motion to correct error.

We dismiss the appeal in part and affirm the judgment of the trial court in part.

RILEY, J., and BAILEY, J., concur.