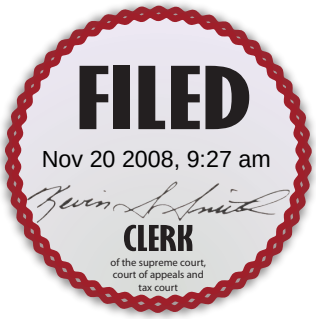

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IN THE COURT OF APPEALS OF INDIANA

MARK E. LAFLECH and DIANA L. LAFLECH,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 56A03-0805-CV-230
ROBERT A. WHITE,	)	
Appellee-Defendant,	)	
GLORIA CARNEY,	)	
Appellee- Intervening Plaintiff.	)	

APPEAL FROM THE NEWTON SUPERIOR COURT
The Honorable Daniel J. Molter, Judge Pro Tempore
Cause No. 56D01-0711-MI-9

November 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Mark and Diana LaFlech appeal the trial court's dismissal of their breach of contract claim against Robert White.

We reverse and remand.

ISSUE

Whether the trial court erred by dismissing the LaFleches' claim.

FACTS

Prior to August of 2007, the LaFleches owned and operated Big Slick's, Inc., a bar and restaurant (the "Restaurant"), located in Roselawn. The LaFleches owned fifty percent of the Restaurant's shares; White owned the other fifty percent.

On August 21, 2007, the LaFleches entered into a purchase agreement (the "Purchase Agreement") with White, wherein the LaFleches agreed to sell their shares in the Restaurant, including "their entire interest in any liquor license held by" the Restaurant to White for $100,000 "on or before forty-five (45) days from the date of executing [the] Purchase Agreement." (LaFleches' Ex. 1(a)). The first addendum to the Purchase Agreement provided that the parties would close on August 30, 2007.

A second addendum to the Purchase Agreement further provided, in part, as follows:

> This contract of sale is premised on the assumption that the ATC [Alcohol & Tobacco Commission] permit/license is in the name of the business (Big Slick's, Inc.), so there will be no need for a license transfer upon transfer of

> the stock in the business. In the event the license were otherwise held, then the parties still contemplate a sale, but, in such event, the proceeds would be held in the escrow account of Attorney [Harry] Falk pending transfer of the license while the business was run under a management agreement or other vehicle because the ATC permit, for obvious reasons, is an integral part of this transaction.

Id.

On or about August 30, 2007, the parties entered into a separate agreement (the "August 30 Agreement"), which provides as follows:

> WHEREAS, the purpose and intent of this purchase is that [White] obtain sole control over [the Restaurant] and ATC permit for which Big Slick's was formed and,
>
> WHEREAS, the parties understand that the liquor permit granted through ATC is held in the name of the corporate entity but will require more than a sale of the corporate entity, as contemplated, to vest control with [White] but will also require approval/transfer by ATC, and
>
> WHEREAS, some assets are not held through or by the corporate name, including the leasehold interest and,
>
> WHEREAS, the parties have met in a conference this very day with their respective attorneys to initiate this sale and transfer to [White] in return for the payment to [the LaFleches] and,
>
> WHEREAS, the transfer of funds and the cessation of all participation by [the LaFleches] will cease on this date but,
>
> WHEREAS, there will be further documents, transfers, resolutions, etc. that need to be completed to perfect or aid full transfer of interest and there will be necessary steps to transfer the ATC permit,
>
> * * *
>
> WHEREAS, all parties want to complete the sale, minus the future signing of any further necessary papers and transfer/approval by ATC; and
>
> * * *

WHEREAS, the parties will continue, as long as necessary, to sign any papers which are reasonably necessary or helpful in completing the purpose of this sale, to-wit, transfer of full and complete interest from [the LaFleches] to [White] in the corporate entity and all other assets or rights ancillary to running of the [Restaurant] . . . .

THEREFORE, IN CONSIDERATION OF THE FOREGOING, IT IS AGREED ON THIS DATE, SIGNED BELOW, AS FOLLOWS:

1. That the draft for $95,000.00 shall be made payable this date to Harry Falk and his clients, [the LaFleches], which sum together with the $5,000.00 earnest money, constitutes the full sum of $100,000.00, for the agreed price for all interest, ownership, or control over the corporate entity Big Slick's, Inc. and/or any collateral interest thereto including the ATC permit, leasehold interest or other items that could be in individual as opposed to corporate names.

2. That any further documents, transfers, resolutions, actions or forbearance which are reasonably necessary or helpful in effectuating the transfer and interest contemplated by this sale will be, upon request, performed, executed or completed by [the LaFleches], including but not limited to Corporate documents, ATC documents, leasehold documents, etc.

* * *

5. That, additionally, each party, herein, through their attorney, may consult further and determine any and all papers, documents and action which is believed helpful and/or preferred by them to be executed or completed in conjunction with this contract and such list shall be exchanged on or before September 17, 2007. That reasonable enlargements or extensions shall be granted by mutual consent which consent will not be unreasonably withheld.

6. That until . . . the ATC transfer is completed the $100,000.00 sales proceeds, minus the sum of $5,000.00, shall remain in the escrow account of Attorney Harry J. Falk.

7. That upon completion of the conditions above, the remaining escrow funds maybe [sic] transferred, from the escrow account of Harry J. Falk . . . .

> 8. That the obligation of the parties to sign any and all documents or take any and all action reasonably necessary or helpful in effectuating the transfer of interest, corporate and otherwise, in the bar and restaurant business in which they have been engaged shall not expire at the conclusion of the foregoing but, rather, shall remain an ongoing obligation.
>
> 10. [White] shall pay the $1,000.00 costs of transferring corporate interest and/or ATC permits [illegible].
>
> 11. That upon failure of either party to complete any actions or documents contemplated in this instrument the prevailing party shall be entitled to all available remedies at law plus attorney fees and costs.

Id. (Emphasis added). The LaFleches also assigned to White "all their interests and rights under the lease agreement" in the Restaurant. (LaFleches' Ex. 1(b)).

Relying on the August 30 Agreement, the LaFleches filed a breach of contract claim against White on November 2, 2007. On or about November 20, 2007, the LaFleches signed State Form 49930, "Consent to Transfer Executed as Part of a Purchase Agreement," consenting to the transfer of the ATC permit to White. (*See* LaFleches' Ex. 3). At some point, the LaFleches also signed consents to transfer their shares of the Restaurant's stock.[1] On December 3, 2007, White filed with the ATC an application to transfer the LaFleches' alcoholic beverage permit to him. According to a notation on the application, a hearing before the local board was scheduled for February 12, 2008.

Falk withdrew his appearance on December 21, 2007, after which the trial court ordered that the $95,000.00 held in his escrow account be distributed to the clerk of the Newton Superior Court (the "Clerk") and deposited into a trust account. On December 28, 2007, White filed his answer, counterclaim and motion to dismiss.

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[1] Mr. LaFlech testified that he and his wife "signed stock papers or consent to transfer on September . . . 11th"; the LaFleches again signed consents to transfer on November 20, 2007. (Tr. 30).

On February 6, 2008, Gloria Carney filed a motion to intervene, claiming an interest in the funds held by the Clerk. Thereafter, Carney filed a cross-claim against White. On April 4, 2008, White filed an answer to Carney's cross-claim and a counterclaim.

The trial court held a bench trial on April 8, 2008.[2] Carney requested that the trial court "continue the trial as to the Counterclaim filed by [White] and against [Carney] to afford counsel an opportunity to file a written Answer . . . ." (App. 6).[3] The trial court, "having heard argument and having been duly advised Intervener/Cross Claimant Carney seeks rescission of contract with Defendant White," denied Carney's "motion to continue the trial on the issues contained within the Counterclaim but grant[ed] [Carney] leave to supplement her case in chief as to the issue of damages." *Id.*

During the hearing, Mr. LaFlech testified that as of August 30, 2007, neither he nor his wife had been involved in the operation of the Restaurant; in fact, Carney's counsel stated on the record that White and Carney had signed the Restaurant's lease on September 1, 2007. Mr. LaFlech further testified that as of April 8, 2008, White was remodeling the Restaurant to bring it into compliance with ATC rules regarding

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[2] It is unclear whether this was a bench trial or a hearing on a motion to dismiss. It appears from the chronological case summary (the "CCS") that White filed a motion to dismiss on December 28, 2007. On February 26, 2008, the trial court held a hearing on the motion to dismiss as well as the LaFleches' motion to vacate and motion to strike. According to the CCS, the trial court "denie[d] mtn." (App. 2). As the trial court referred to the April 8, 2008 proceeding as a bench trial, we presume that it denied White's motion to dismiss on February 26, 2008.

[3] We direct the LaFleches' counsel to Indiana Appellate Rule 51(C), which requires that "[a]ll pages of the Appendix shall be numbered at the bottom consecutively . . . ." Although numbered tabs separate the documents in the LaFleches' Appendix, the individual pages are not numbered; thus, our review of this case has been hindered. Due to counsel's failure to abide by Appellate Rule 51(C), we have numbered the pages sequentially.

separating the bar area from the dining area. This testimony was supported by White's counsel's statement on the record that White testified at a hearing before the ATC that "they were going to try to put up one of those side walls to separate [the] adults and children section . . . ." (Tr. 27).[4]

Mr. LaFlech also testified that on September 11, 2007, he and his wife signed consents to transfer the stock of the Restaurant, subject to the ATC's approval. He also testified that on November 20, 2007, White's girlfriend presented to the LaFleches consent forms to transfer their stock in the Restaurant to White and another consent form to transfer the ATC permit to White. As with the consents to transfer stock signed on September 11, 2007, the consents to transfer stock provided by White's girlfriend "formally notif[ied] the [ATC]" of the transfer of stock, subject to the ATC's approval. (LaFleches' Exs. 2, 3). Mr. LaFlech testified that he and Mrs. LaFlech signed the forms and returned them to White's girlfriend; it is undisputed that the LaFleches signed these consents on November 20, 2007.

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[4] Specifically, White's counsel questioned Mr. LaFlech as follows:

Q [Y]ou're aware the business has shut down right now, are you not?
A As far as I know, it's just being remodeled.
Q Who do you think is remodeling it?
A Mr. White said it at one of the alcohol hearings. That's what he told the lady at the alcohol hearing.
Q What he told the lady was that they were going to try to put up one of those side walls to separate [the] adults and children section, did he not?
A He said remodel and put that wall up. So I'm guessing that meant remodel.

(Tr. 27). According to the application White filed with the ATC, if a restaurant intends to permit guests under the age of 21 on the premises, "there must be COMPLETE SEPARATION of the barroom from the room or rooms where individuals under the age of 21 will be present." (LaFleches' Ex. 2). The application indicated that White intended to permit guests under the age of 21 in the Restaurant.

After the LaFleches presented their evidence, White moved for a judgment on the evidence; Carney joined in the motion. The trial court granted White's motion and issued a written order supporting its decision. The order provided, in pertinent part, as follows:

> [The LaFleches] argue that Defendant White has acted in bad faith and has caused delay by his inaction toward any attempts to secure a transfer of liquor license. [Carney] withdraws her oral motion for findings of fact and conclusions of law.
>
> [White] and [Carney] ask the Court to and the Court now specifically finds:
>
> [The LaFleches] and [White] entered into an agreement August 30, 2007 to sell and transfer [the LaFleches'] fifty percent (50%) corporate interest in a business entity commonly known as Big Slick's, Inc.
>
> That the parties understood the liquor permit granted through the [ATC] and so critically necessary to the operation of the business entity was held in the name of the corporate entity and not individually by either party.
>
> That the agreement contemplated the mutual cooperation and effort of all parties, including the execution of necessary documents in a timely manner, to effectuate a complete and proper transfer of the liquor license to the necessary parties.
>
> That while many of the necessary documents were completed and submitted at a date much later than contemplated by the parties, processes and steps remain to fully comply with conditions set by the ATC to grant a transfer of liquor license and no transfer has been granted.
>
> [White] has enjoyed exclusive possession of the business entity since the execution of the Agreement.
>
> That delinquent taxes are due and owing and must be paid and some structural improvements must be completed before a transfer of liquor license can be completed.
>
> That no transfer of corporate stock has occurred to date so [the LaFleches] and [White] continues [sic] to own equal interest in Big Slick's, Inc.
>
> That all of the parties are equally at fault for any material breach of the terms of the agreement by their failure to act in a timely manner to

> effectuate a transfer of liquor license as a result of their mutual failure to meet the condition precedent of such transfer.
>
> That [Carney] has tendered in escrow $95,000.00 to be held until such time as [the LaFleches] and [White] have successfully performed the terms of transfer of [the LaFleches]' interest in Big Slick's, Inc. to [White].
>
> [The LaFleches] have failed to establish by a preponderance of the evidence that [White] solely breached the sales agreement resulting in damages to [the LaFleches].

(App. 6-7). As to Carney's cross-claim and White's counterclaim against Carney, the trial court ordered "the money held in the Clerk of Court's trust account held in escrow pending resolution of the respective complaints." (App. 8).

DECISION

The LaFleches appeal the trial court's dismissal of their breach of contract claim.[5] Specifically, they contend that the trial court erred in finding a mutual breach of contract.[6]

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[5] Here, White and Carney moved for a motion for judgment on the evidence. "A motion for judgment on the evidence under Indiana Trial Rule 50 is improper at a bench trial." *Taflinger Farm v. Uhl*, 815 N.E.2d 1015, 1019 n.2 (Ind. Ct. App. 2004). As this case was tried before the court without a jury, it should be treated as a motion for involuntary dismissal pursuant to Indiana Trial Rule 41(B). *Id.* Indiana Trial Rule 41(B) provides:

> After the plaintiff or party with the burden of proof upon an issue, in an action tried by the court without a jury, has completed the presentation of his evidence thereon, the opposing party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the weight of the evidence and the law there has been shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all evidence. If the court renders judgment on the merits against the plaintiff or party with the burden of proof, the court, when requested at the time of the motion by either party shall make findings if, and as required by Rule 52(A). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication upon the merits.

[6] White has not filed a brief; however, Carney has filed a brief. In their reply brief, the LaFleches argue that Carney "is not a proper party to participate in this appeal," and therefore, lacks standing. Reply Br. at 2. We disagree. "An intervenor is treated as if [s]he were an original party and has equal standing with the original parties." *Panos v. Perchez*, 546 N.E.2d 1253, 1254 (Ind. Ct. App. 1989).

> Our standard of review with regard to motions for involuntary dismissal under Ind. Trial Rule 41(B) is well settled. In reviewing a motion for involuntary dismissal, this court does not reweigh the evidence or judge the credibility of the witnesses; rather we only consider the evidence most favorable to the verdict and the reasonable inferences therefrom. We will reverse the trial court only if the trial court's judgment is clearly erroneous.

Taflinger Farm, 815 N.E.2d at 1017-18 (citations omitted).

"The particular clearly erroneous standard that is to be employed depends upon whether the appealing party appeals a negative or an adverse judgment." *Romine v. Gagle*, 782 N.E.2d 369, 376 (Ind. Ct. App. 2003), *trans. denied*. "A negative judgment is one that was entered against a party bearing the burden of proof; an adverse judgment is one that was entered against a party defending on a given question, i.e., one that did not bear the burden of proof." *Id.* Where, as here, a party is appealing from a negative judgment, the party will prevail only if the judgment is contrary to law. *MCS LaserTec, Inc. v. Kaminski*, 829 N.E.2d 29, 34 (Ind. Ct. App. 2005). "A judgment is contrary to law when the evidence is without conflict and all reasonable inferences to be drawn from the evidence lead to only one conclusion, but the trial court reached a different conclusion." *Id.*

The LaFleches argue that White's conduct—particularly in failing to comply with ATC's regulations—prevented the transfer of the alcoholic beverage permit and therefore prevented the completion of the sale of the Restaurant. Thus, they contend that White breached the contract to buy the LaFleches' shares of the Restaurant.

> Under contract law, a condition precedent is a condition that must be performed before the agreement of the parties becomes a binding contract or that must be fulfilled before the duty to perform a specific obligation arises. However, in *Hamlin v. Steward*, 622 N.E.2d 535, 540 (Ind. Ct. App.

> 1993), we recognized the rule that a party may not rely on the failure of a condition precedent to excuse performance where that party's own action or inaction caused the failure. When a party retains control over when the condition will be fulfilled, it has an implied obligation to make a reasonable and good faith effort to satisfy the condition. A good faith effort is defined as what a reasonable person would determine is a diligent and honest effort under the same set of facts or circumstances.

AquaSource, Inc. v. Wind Dance Farm, Inc., 833 N.E.2d 535, 539 (Ind. Ct. App. 2005) (some citations omitted) (emphasis added), *reh'g denied*.

In this case, the condition precedent was that the ATC transfer be completed before the "$100,000 sales proceeds, minus the sum of $5,000" be transferred from Falk's escrow account to the LaFleches. (LaFleches' Ex. 1(a)). Accordingly, satisfaction of the condition precedent required the parties to make a reasonable and good faith effort to obtain the ATC's approval of the transfer, including "sign[ing] any and all documents or tak[ing] any and all action reasonable or helpful in effectuating the transfer of interest . . . ." *Id.*

Pursuant to the August 30 Agreement, the LaFleches agreed, "upon request," to sign documents necessary to transfer the alcoholic beverage permit to White. (LaFleches' Ex.1(a)). Further, the parties agreed that they would "continue, as long as necessary, to sign any papers which are reasonably necessary or helpful in completing the purpose of th[e] sale . . . ." *Id.* The August 30 Agreement further obligated the parties to "take any and all action reasonably necessary or helpful in effectuating the transfer of interest, corporate or otherwise, in the [Restaurant]" and that such would remain an "ongoing obligation." *Id.*

Here, the LaFleches presented evidence that they signed consents to transfer the Restaurant's stock as well as a consent to transfer the ATC permit to White. According to Mr. LaFlech's testimony and the evidence presented, these documents arguably were signed on or before September 11, 2007 and definitely on or before November 20, 2007. The LaFleches further presented evidence that on December 3, 2007, White filed an application to transfer the alcoholic beverage permit; however, statements during the trial indicate that White had not yet complied with the ATC rules regarding separation of the bar area from the restaurant area. Mr. LaFlech further testified that pursuant to the August 30 Agreement, White had taken over the operation of the Restaurant and enjoyed exclusive possession of the business as of August 30, 2007.

Again, "the *Hamlin* doctrine requires that '[w]hen a party retains control over when the condition will be fulfilled, it has an implied obligation to make a reasonable and good faith effort to satisfy the condition.'" *AquaSource*, 833 N.E.2d at 538 (quoting *Hamlin*, 622 N.E.2d at 540). Here, the LaFleches presented evidence that as of August 30, 2007, White retained control over the business premises and therefore over any renovations required to complete the transfer of the ATC permit. Thus, White was required to make a reasonable and good faith effort to conform to the ATC's rules and regulations in an effort to satisfy the condition precedent. There was no evidence that he had done so, although the LaFleches did present evidence that they had signed the necessary documents to effect the transfer.

Given the evidence, we cannot say that the LaFleches breached the August 30 Agreement, where the LaFleches executed the necessary documents to transfer the ATC

permit. We therefore find that the evidence points to a conclusion different from the one reached by the trial court.

Reversed and remanded for further proceedings consistent with this opinion.

FRIEDLANDER, J., and BARNES, J., concur.