

224 N.E.3d 970 (Table)
Unpublished Disposition

(This disposition by unpublished memorandum decision is referenced in the North Eastern Reporter.) Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish *res judicata*, collateral estoppel, or law of the case.
Court of Appeals of Indiana.

Frank GARBER, Appellant-Defendant,

v.

Robert BLAIR, Appellee-Plaintiff

Court of Appeals Case No. 23A-CT-953

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Filed November 1, 2023

Appeal from the Kosciusko Circuit Court, The Honorable [Michael W. Reed](#), Judge, Trial Court Cause No. 43C01-2209-CT-58

Attorneys and Law Firms

Attorneys for Appellant: [Nicholas A. Podlaski](#), M. Brooks Pearce, Podlaski LLP, Fort Wayne, Indiana

Attorney for Appellee: [Theora E. Ohaneson](#), Graber Law Firm, Middlebury, Indiana

MEMORANDUM DECISION

[Mathias](#), Judge.

*1 [1] Frank Garber appeals from the Kosciusko Circuit Court's judgment in his favor on his counterclaim against Robert Blair, in which Garber sought to foreclose on Blair's mortgage and recover damages for breach of contract. Garber presents two issues for our review:

1. Whether the trial court erred when it calculated Garber's damages.
2. Whether the trial court abused its discretion when it awarded Garber \$5,000 in attorney's fees.

[2] We affirm.

Facts and Procedural History

[3] On July 1, 2019, Blair bought a house in Pierceton, Indiana, from Garber, and they executed a mortgage and a promissory Note ("the Note"). Blair agreed to pay Garber \$180,000 for the house in monthly installments of \$2,000 with no interest. Blair also agreed to obtain a homeowner's insurance policy and to pay the real estate taxes. The Note provides in relevant part as follows:

If any payment pursuant to the Note is not paid when due, the entire unpaid principal and interest shall, at the option of [Garber] become immediately due and payable. Forbearance on the part of [Garber] in accelerating or pursuing collection of this Note shall not operate as a waiver of the right to do so at any future date. Upon default, [Garber] shall be entitled to recover all costs of collection, including, but not limited to, reasonable attorney fees. This Note is payable without relief from valuation or appraisal laws. This Note may be prepaid in full, or in part, without penalty. *Payments shall be applied first to costs of collection, then to interest, then to principal.*

... If this Note is inconsistent with any security agreement or mortgage, the provisions of this Note shall control.

A late payment is defined as any payment received more than fifteen days (15) past due. The penalty for a late payment shall be \$100.00. In the event a payment is received more than sixty days (60) past due, the penalty shall be \$200.00. In the event a payment is received more than ninety days (90) past due, the penalty shall be \$300.00.

Also, if at any time [Blair] fails to pay taxes and/or homeowner[']s insurance on the actual due date, there will be a penalty assessed in the amount of \$500.00 each time there is a failure to pay.

Ex. p. 13 (emphasis added).

[4] At closing, there was an open insurance claim regarding prior damage to the roof of the house. Accordingly, Blair had difficulty obtaining a homeowner's insurance policy. Garber told Blair to get the policy as soon as possible. Blair repaired the roof and got an insurance policy on August 6. Garber did not ask Blair to pay any penalty under the terms of the Note. Blair had an accidental lapse in homeowner's insurance coverage from September to November 2020. And in November 2020, Blair's payment of the real estate taxes was five days late. Garber did not ask Blair to pay any penalties as a result of those defaults.

[5] However, after Blair failed to make timely installment payments in December 2021 and January 2022, Garber hired an attorney, who wrote Blair a letter demanding

*2 \$13,000.00 in late fees for your failure to keep insurance on the Property; PLUS

\$500.00 in late fees for your failure to timely pay taxes; PLUS

\$300.00 in late fees for your failure to timely pay monthly installments; PLUS

\$4,000.00 in current estimated costs and expenses

TOTAL: \$17,800.00

Id. at 33. In the alternative, Garber demanded

\$123,000.00 remaining on the principal; PLUS

\$13,000.00 in late fees for your failure to keep insurance on the Property; PLUS

\$500.00 in late fees for your failure to timely pay taxes; PLUS

\$300.00 in late fees for your failure to timely pay monthly installments; PLUS

\$4,000.00 in current estimated costs and expenses

TOTAL: \$140,800.00

Id. at 33-34. Blair then submitted to Garber's attorney a letter disputing the calculations of his accrued penalties and presented his attorney with a check for \$2,000¹ to cover any late fees and costs to Garber he had accrued from the late payments in December 2021 and January 2022.

[6] Blair did not hear anything from Garber between March 2022 and August 2022, when Blair attempted to sell the house to his son. After a dispute over the amount Blair owed Garber on the Note arose, Blair was unable to close on the sale, and he filed a complaint against Garber alleging breach of contract and interference with a prospective business relationship. Garber filed a counterclaim for foreclosure and alleging breach of contract. Blair was ultimately able to close on the sale to his son in February 2023, and he dismissed his complaint.²

[7] Following an evidentiary hearing on Garber's counterclaims on February 28, 2023, the trial court entered judgment for Garber in the amount of \$8,200 on his

counterclaims. The trial court found and concluded in relevant part as follows:

The parties agree written notice of [Blair's alleged] defaults was first sent on or around February 10, 2022, after [Garber] retained counsel. (Exhibit "C" and Exhibit "D"). No prior written notification of default was given by [Garber], and in fact [Garber] failed to return or answer phone calls from [Blair], or his wife, which were made in an attempt to resolve the disputes informally prior to this time. Importantly, the first written notice of these defaults was sent after the alleged defaults [for lapsed homeowner's insurance coverage and late real estate tax payment] had been cured and [Garber] incurred no actual loss or harm from these defaults.

Waiver is an intentional relinquishment of a known right involving both knowledge of the existence of the right and the intention to relinquish it. Estoppel is a judicial doctrine sounding in equity; it is a concept by which one's own actions or conduct prevents the claiming of a right due to the detriment of another party who was entitled to and did rely on the conduct. *T-3 Martinsville, LLC v. U.S. Holding, LLC*, 911 N.E.2d 100 (Ind. Ct. App. 2009).

[Garber's] failure to act on any alleged defaults of [Blair] prior to February 10, 2022, was deliberate conduct which constituted acquiescence in and waiver of any right to proceed under any default or penalty provision in the Promissory Note or Mortgage. Defendant, *pursuant to the doctrine of equitable Estoppel*, was therefore required to give reasonable notice with an opportunity to cure to [Blair] before imposing any penalties or other default rights [Garber] might have under the Promissory Note and Mortgage. *See also Pierce v. Yochum*, 330 N.E.2d 102 (Ind. Ct. App. 1975). Therefore, [Garber] has waived any right under the Mortgage and Promissory Note to retroactively apply penalties and other default rights purportedly existing in his favor and against [Blair]. *As of November 1, 2021, the Court specifically finds that [Blair] was in full and complete compliance with his obligations under the Promissory Note and Mortgage which were in effect reinstated.*

*3 [Garber's] failure to send any default notice prior to February 10, 2022, constitutes a breach of [Garber's] obligations under the Mortgage (Section 14 and Section 17).^[3] Also, [Garber's] delay in sending notice constitutes his acceptance of cure and waiver of any right to proceed under these defaults. In fact, under Section 17.5 of the

Mortgage, the Mortgage was reinstated and [Blair] was in compliance with the terms of same as of November 1, 2021, and the Court specifically finds [Blair] was in full compliance with his obligations under the Promissory Note and Mortgage at that time.

[Blair] did fail to make payments as agreed, whether through his actual fault or not, beginning with the payment due December 1, 2021. The actual payments were set forth in Exhibit “A” to [Blair’s] Complaint and are attached to this Judgment together with the Court’s findings as to the application of those payments pursuant to the terms of the Promissory Note and Mortgage. (Attached Exhibit “J”). As of September 1, 2022, [Blair] was in default under these agreement[s] in the total sum of \$2,000.00. \$1,000.00 of which arose for the payment due April 1, 2022, which was not paid and \$1,000.00 for costs/penalties properly applied under the terms of the agreements arising from the late/missed payments. [Blair] filed this lawsuit on September 22, 2022, and no payments were made after this date. The payments due October 1, 2022, November 1, 2022, December 1, 2022, January 1, 2023, and February 1, 2023, were not made. These payments were late and accrued penalties totaling \$1,200.00 as set forth on Exhibit “J” and assuming a payment date of the trial date of February 28, 2023.

Accordingly, as of the date of trial, [Blair] was indebted to [Garber] under the Promissory Note and Mortgage for his defaults and/or penalties in the total amount of \$3,200.00, excluding costs of collection and reasonable attorney fees. [Garber] requested costs of collection, believed to be attorney fees only, in the amount of \$61,003.57. (see Affidavit for Attorneys’ Fees, Costs, and Expenses and attached Exhibit “1”)

As to these requested attorney fees, the Court finds in general that this request is grossly disproportionate to the amount truly in controversy here, which the Court has previously determined to be \$3,200.00. Additionally, these fees were incurred by [Garber] in large part because [Garber’s] interpretations of the applicable provisions of the Promissory Note and Mortgage were untenable, as set forth at trial and in Exhibits “C”, “D”, and “E”, and the vast majority of the requested attorney fees were unreasonably incurred by [Garber] pursuing enforcement of these terms.

The documents in question do provide that [Garber] may collect all costs incurred in pursuing any remedies for default including, but not limited to, reasonable attorneys’

fees, costs of title evidence and survey and expenses for environmental testing under certain circumstances. Costs of collection presented to the Court consisted of reasonable attorney fees. As set forth above, the Court believes the vast amount of attorney fees requested by [Garber] are not reasonable based upon the nature of the dispute, the amount in controversy, the unreasonable interpretation of contract documents by [Garber], and based upon services which should have been required to resolve this dispute reasonably. Based upon the evidence presented to the Court, the Court believes this dispute should have been resolved with the expenditure of reasonable attorney fees and other costs in the approximate sum of \$5,000.00 or less and that an attorney fee award in this sum is fair and reasonable under these circumstances.

*4 IT IS, THEREFORE, ORDERED that the Defendant, Frank D. Garber, Jr., have and recover of and from the Plaintiff, Robert Blair, the sum of \$8,200.00 as a final judgment resolving all pending issues by and between the parties.

Appellant’s App. Vol. 2, pp. 14-16 (emphases added).

[8] Thereafter, during a status conference on April 21, Garber stated that the trial court had omitted from its judgment the balance owing on the principal under the Note. The trial court and the parties agreed to treat Garber’s statement as a motion to correct error, which the court granted. In its order on the motion to correct error, the trial court found that Blair owed Garber an additional \$97,000 for the principal owing on the Note and entered final judgment in the amount of \$105,200 (\$97,000 plus \$8,200). This appeal ensued.

Discussion and Decision

Issue One: Damages Calculation

[9] Garber first contends that the trial court misinterpreted the parties’ mortgage and Note and grossly undercalculated his damages. Construction of the terms of a written contract generally is a pure question of law that we review de novo. See *Layne v. Layne*, 77 N.E.3d 1254, 1265 (Ind. Ct. App. 2017), *trans. denied*. The goal of contract interpretation is to determine the intent of the parties when they made the agreement. *Id.* This court must examine the plain language of the contract, read it in context and, whenever possible, construe it so as to render every word, phrase, and term meaningful, unambiguous, and harmonious with the whole. *Id.* If contract language is unambiguous, this court must

determine the parties' intent from the four corners of the instrument. *See id.*

[10] Garber argues that,

[c]onsidering the admitted facts (specifically that Blair failed to pay taxes and obtain insurance upon closing) and the payment terms in Section 5 of the Mortgage, Blair has never made a full payment on the principal and has continued to accumulate late fees from the outset (see Appellant's App. Vol. II, pgs. 94-95, 101). Notice of default is not required unless [Garber] chose to accelerate under the Mortgage, which he did not (Appellant's App. Vol. II, pg. 98). As such, [Garber]'s interpretation and requests for damages and fees are tenable, reasonable, and most crucially, supported by Indiana law.

Appellant's Br. at 13. But Garber's argument turns on an erroneous interpretation of the plain language of the mortgage and promissory Note.

[11] First, in support of his calculation of the penalties owing for late monthly installment payments, Garber relies on Section 5 of the mortgage, which provides as follows:

Unless applicable law or other provisions of this Mortgage or the Note provide otherwise, all payments received by [Garber] shall be applied in the following order: first, to costs incurred by [Garber] as a result of [Blair's] default under this Mortgage or the Note; second, to late charges; third, to prepayment premium or chart; fourth, to payments for escrow items pursuant to section 4; fifth, to interest; and last, to principal; in each case, when due.

*5 Ex. p. 16 (emphasis added). But he ignores the following relevant provisions in the Note: "Payments *shall be* applied first to costs of collection, then to interest, then to principal *If this Note is inconsistent with any security agreement or mortgage, the provisions of this Note shall control.*" *Id.* at 13 (emphases added).

[12] In other words, under the express terms of the Note, late charges/penalties could *not* be deducted from Blair's monthly installment payments as Garber alleges. Because there was no interest, the only deductions from Blair's installment payments that could have been made were for any collection costs incurred by Garber. Garber did not incur any collection costs until he hired his attorney in February 2022, so the first deduction could not have occurred until the February installment payment, at the earliest. And the penalties for late payments, lapses in insurance coverage, and late real estate

tax payments accrued but *could not have been deducted* from Blair's monthly installment payments as Garber alleges.

[13] Second, the trial court found that Garber had waived *any* penalties incurred prior to November 1, 2021, including penalties for the late real estate tax payment and insurance policy coverage lapses. The trial court concluded that Garber was estopped from recovering those penalties for not timely notifying Blair of the penalties with an opportunity to cure them. In the alternative, the trial court found that the mortgage required that Garber give Blair notice of any penalties and that Garber had breached the parties' contract when he failed to do so prior to February 2022.

[14] Garber maintains that the penalties for each of Blair's defaults were "automatic" under the terms of the Note and that no notice to Blair was required unless Garber sought to accelerate the loan. *See* Appellant's Br. at 16. But Garber does not address the trial court's conclusion that he was estopped from seeking recovery of penalties incurred prior to November 2021. Thus, Garber has waived our review of that issue.⁴

[15] In sum, Garber has based his entire argument on a fundamental misinterpretation of the plain language of the parties' contract. And Garber does not address the trial court's conclusion that he is estopped from seeking payment of penalties accrued prior to November 2021. The trial court imposed penalties against Blair for late payments beginning in December 2021. Garber has not shown any error, and we affirm the trial court's judgment for Garber in the amount of \$100,200, plus attorney's fees, which we address below.

Issue Two: Attorney's Fees

[16] Garber next contends that the trial court abused its discretion when it calculated the attorney's fee award. We review a trial court's award of attorney's fees for an abuse of discretion. *River Ridge Dev. Auth. v. Outfront Media, LLC*, 146 N.E.3d 906, 912 (Ind. 2020). An abuse of discretion occurs when the court's decision either clearly contravenes the logic and effect of the facts and circumstances or misinterprets the law. *Id.* To make this determination, we review any findings of fact for clear error and any legal conclusions *de novo*. *Id.*

*6 [17] Garber maintains that "it was inappropriate for the trial court to claim the 'request [for \$61,003.57 in fees] is grossly disproportionate to the amount truly in controversy

here.’ ” Appellant's Br. at 26 (quoting the trial court's order). But Blair never disputed that he owed the \$97,000 on the principal. The only amount in dispute was the total accrued penalties owing, and that amount is only \$3,200. Thus, Garber's argument misses the mark. In any event, this Court has held that a trial court may consider the amount involved in determining the reasonableness of the requested fees. *See Gerstbauer v. Styers*, 898 N.E.2d 369, 380 (Ind. Ct. App. 2008).

[18] Garber also asserts that his attorney “spent significant time and resources on the case since being retained in early 2022,” including sending “multiple demand letters,” defending against Blair's complaint, and prevailing “on an amount due and outstanding above and beyond the Mortgage/Note.” Appellant's Br. at 25. But, from the very beginning of

his representation, Garber's attorney misinterpreted the plain language of the parties' Note in pursuing thousands of dollars in penalties that were never accrued. Thus, Garber's attorney incurred legal expenses that cannot be justified. We cannot say that the trial court abused its discretion when it awarded Garber \$5,000 in attorney's fees.⁵

[19] Affirmed.

Riley, J., and Crone, J., concur.

All Citations

224 N.E.3d 970 (Table), 2023 WL 7173485

Footnotes

- 1 Garber never cashed that check.
- 2 Blair put \$180,000 into escrow pending the resolution of Garber's counterclaims.
- 3 Section 17.2 provides in relevant part that Garber was to notify Blair “prior to acceleration following an Event of Default” detailing what the default was, what action Blair could take to cure the default, and when the cure must be made. Ex. p. 10. It is undisputed that Garber did not pursue a remedy of acceleration prior to February 10, 2022.
- 4 Garber addresses estoppel and waiver for the first time in his Reply Brief. “The law is well settled that grounds for error may only be framed in an appellant's initial brief and if addressed for the first time in the reply brief, they are waived.” *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 977 (Ind. 2005).
- 5 Because we affirm the trial court's attorney's fee award, we do not address Garber's request for appellate attorney's fees.