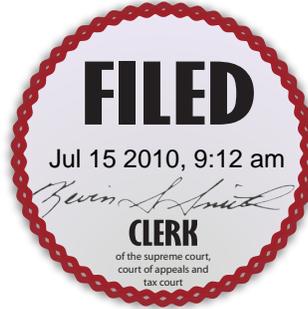


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JAMESTOWN HOMES, INC.,)

Appellant-Plaintiff,)

vs.)

No. 02A03-1001-SC-6

RONALD L. COMER,)

Appellee-Defendant.)

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Jerry L. Ummel, Magistrate
Cause No. 02D01-0910-SC-20371

JULY 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Appellant Jamestown Homes, Inc. (“Jamestown”), appeals from the trial court’s grant of Appellee Ronald L. Comer’s motion to correct errors. We affirm.

ISSUE

Jamestown raises three issues, which we consolidate and restate as whether the trial court erred when it granted Comer’s motion to correct errors and entered judgment in Comer’s favor.

FACTS AND PROCEDURAL HISTORY

Jamestown owns and operates a cooperative housing project in Fort Wayne, Indiana known as Jamestown Homes (“the project”). The project consists of apartments. In lieu of rent, an apartment resident pays monthly “carrying charges” to Jamestown. Appellant’s App. p. 52. The carrying charges pay for the project’s operating expenses, taxes, and maintenance costs, among other expenditures.

On October 24, 2008, Jamestown and Comer executed an Occupancy Agreement (“the Agreement”), pursuant to which Comer leased unit number 103C in the project. Comer agreed to pay carrying charges of \$413.00 per month, due on the first day of each month.

With respect to breaches of the Agreement, that document provides as follows, in relevant part:

ARTICLE XIII: DEFINITION OF DEFAULT BY MEMBER AND EFFECT THEREOF

1. It is hereby mutually agreed as follows: If at any time after the happening of any of the events specified in clauses “a” to “l” of this Article, the

Corporation shall give to the Member a notice that this agreement will expire at a date not less than thirty (30) days thereafter (except that in the case of the default specified in clause “h” of this Article, such date in the notice shall be ten (10) days instead of thirty (30) days), this agreement and all of the Member’s rights under this agreement will expire on the date so fixed in such notice, unless in the meantime the default has been cured in a manner deemed satisfactory to the Corporation, it being the intention of the parties hereto to create hereby conditional limitations, and it shall thereupon be lawful for the Corporation to re-enter the dwelling unit and to remove all persons and personal property therefrom, either by summary dispossess proceedings or by suitable action or proceeding at law or in equity or by any other proceedings which may apply to the eviction of members or by force or otherwise, and to repossess the dwelling unit in its former state as if this agreement had not been made.

* * *

h. In case the Member shall fail to pay any sum due pursuant to the provisions of Article I or Article IX hereof.

* * *

4. The failure on the part of the Corporation to avail itself of any of the remedies given under this agreement shall not waive or destroy the right of the Corporation to avail itself of such remedies for similar or other breaches on the part of the Member.

Appellant’s App. pp. 20-21. Article I of the Agreement, referenced above, discusses Comer’s obligation to pay carrying charges to Jamestown. The Agreement further provides that if Comer fails to timely pay the carrying charges, he incurs late fees that would continue to accrue until he pays the overdue carrying charges.

On November 11, 2008, Jamestown sent Comer a notice that he had failed to timely pay his carrying charges for that month. The notice instructed Comer to pay the carrying charges and associated late fees by the fifteenth of the month. The notice further provided that if Comer failed to pay the carrying charges and late fees by the fifteenth of

the month, “this letter will serve as NOTICE OF EVICTION,” and Comer would be obligated under those circumstances to return possession of the unit to Jamestown within ten (10) days or Jamestown would file a suit for eviction. Appellant’s App. p. 67. Comer paid the carrying charges and associated late fees on November 13, 2008.

On January 12, 2009, Jamestown sent Comer a notice that he had failed to timely pay his carrying charges for that month. This notice was identical in form to the November 11, 2008 notice. Comer paid the carrying charges and associated late fees on January 15, 2009.

On February 16, 2009, Jamestown sent Comer a notice that he had failed to timely pay his carrying charges for February. The notice was identical in form to the previous two notices. On that same day, Jamestown also sent Comer a letter informing him that it would no longer accept late payments from him. The letter stated that in the future Comer would be required to pay his carrying charges no later than the tenth day of the month, and “[f]ailure to comply will result in immediate legal action for the termination of your occupancy agreement.” Appellant’s App. p. 70. Comer paid his carrying charges and associated late fees on February 23, 2009.

On May 11, 2009, Jamestown sent Comer a notice that he had failed to timely pay his carrying charges for that month. The notice was identical in form to the November 11, 2008, January 12, 2009, and February 16, 2009 notices, including the provision that Comer was obligated to pay the carrying charges and associated late fees by the fifteenth of the month or return possession of the unit to Jamestown under threat of a court action for eviction. Comer paid his carrying charges and associated late fees on May 14, 2009.

In the month of October, 2009, Comer did not tender his carrying charges and associated late fees until October 13, 2009. On that same day, Jamestown filed this case in small claims court, seeking Comer's eviction from unit 103C and payment of court costs. On October 14, 2009, Jamestown, through its counsel, sent Comer a letter that notified Comer that Jamestown had filed the eviction action. In addition, Jamestown returned Comer's tendered payment for the October carrying charges and associated late fees with the letter.

After a hearing, the trial court entered judgment in favor of Jamestown for immediate possession of the apartment and scheduled a hearing on damages. Comer filed a motion to correct errors. After a hearing on Comer's motion, the trial court granted the motion and entered judgment in favor of Comer. The trial court determined that "one issue is dispositive of this case." Appellant's App. p. 7. Specifically, the trial court concluded that Jamestown was obligated by the terms of the Occupancy Agreement to give Comer notice of his breach of the Agreement and an opportunity to cure his breach before beginning eviction proceedings, and that the filing of the lawsuit "left no opportunity to cure" Comer's breach. *See id.*

DISCUSSION AND DECISION

A small claims judgment is "subject to review as prescribed by relevant Indiana rules and statutes." Ind. Small Claims Rule 11(A). Jamestown is appealing the trial court's grant of Comer's motion to correct errors. Rulings on motions to correct error are usually reviewable under an abuse of discretion standard, but we review a case *de novo* when the issue on appeal is purely a question of law. *Indiana Bureau of Motor Vehicles*

v. Charles, 919 N.E.2d 114, 116 (Ind. Ct. App. 2009). The interpretation of a contract is a pure question of law. *Dunn v. Meridian Mut. Ins. Co.*, 836 N.E.2d 249, 251 (Ind. 2005). When a contract is clear and unambiguous, the language must be given its plain meaning. *Delgado v. Boyles*, 922 N.E.2d 1267, 1270 (Ind. Ct. App. 2010).

A deferential standard of review is particularly important in small claims actions where trials are informal and the sole objective is dispensing speedy justice between the parties according to the rules of substantive law. *Reeves v. Downin*, 915 N.E.2d 556, 558 (Ind. Ct. App. 2009). However, this doctrine relates to procedural and evidentiary issues, but does not apply to the substantive rules of law which are reviewed *de novo*. *Id.*

Jamestown first asserts that the trial court erred when it granted Comer's motion to correct errors because Comer waived his defense that Jamestown was obligated to give Comer notice of his breach of the Agreement and an opportunity to cure the breach. Specifically, Jamestown contends that Comer raised his defense for the first time in his motion to correct errors, not at trial, thereby waiving that defense. We disagree. At the trial in this matter, Comer presented evidence, in the form of his own testimony, that he attempted to tender payment of his carrying charges and associated late fees in October 13, 2009, which was the same day that Jamestown filed this suit. Further, documents submitted at trial indicated that when Comer had previously failed to timely pay his carrying charges, Jamestown notified Comer of his error and instructed him to pay the charges and late fees. With due consideration for the deference this Court gives small claims courts on procedural and evidentiary issues, we conclude that Comer sufficiently

raised at trial Jamestown's lack of notice and lack of an opportunity to cure Comer's October 2009 violation of the Agreement, and Comer did not waive that defense.

Jamestown also argues that Comer waived his defense of lack of notice and an opportunity to cure because when Comer raised that defense in his motion to correct errors, he did not file supporting affidavits. Indiana Trial Rule 59(H)(1) provides, "When a motion to correct error is based upon evidence outside the record, the motion shall be supported by affidavits showing the truth of the grounds set out in the motion and the affidavits shall be served with the motion." In this case, Comer's defense did not rely upon evidence outside the record. Instead, in his motion to correct errors Comer cited to evidence that had already been submitted to the small claims court, including the Agreement and Jamestown's notices to Comer. Therefore, Indiana Trial Rule 59(H)(1) does not apply, and Comer did not waive his defense by failing to present affidavits to support his motion to correct errors. *See Reynolds v. Meehan*, 176 Ind.App. 385, 375 N.E.2d 1119, 1121-1122 (Ind. Ct. App. 1978) (noting that the need for affidavits arises "only when the Motion to Correct Errors is based on evidence outside the record").

Next, we turn to the merits of the trial court's decision. Jamestown asserts that it complied with the Agreement by giving Comer notice of his breach of the Agreement. Specifically, Jamestown asserts that the October 14, 2009 letter from Jamestown's counsel to Comer, which notified Comer of the pending eviction action, satisfies the notice requirement. We disagree. Pursuant to the plain language of the Agreement, when a resident breaches the terms of the agreement by failing to timely pay carrying charges, Jamestown must provide notice that the Agreement will expire within ten (10)

days unless the resident cures the default in a manner satisfactory to Jamestown before the expiration date. Furthermore, Jamestown may not take action to regain possession of the dwelling until after the Agreement has expired. In this case, the October 14, 2009 letter did not set an expiration date for the Agreement or explain what steps Comer could take to try to cure his breach. Furthermore, the letter reflects that Jamestown had already begun eviction proceedings. Consequently, the October 14, 2009 letter did not satisfy Jamestown's obligation under the Agreement to notify Comer of his breach of the Agreement and to allow Comer an opportunity to cure the breach.¹

Jamestown next contends that pursuant to the Agreement, it was not obligated to give Comer an opportunity to cure his breach of the Agreement because Comer would not have been able to cure his breach to Jamestown's satisfaction. This argument ignores the plain language of the Agreement. The Agreement provides that when a resident breaches the Agreement, Jamestown shall give notice of an expiration date for the Agreement, and the resident shall have an opportunity to cure the breach prior to that date. It is clear that Jamestown retains the right under the Agreement to determine whether the resident's effort cure is satisfactory. Nevertheless, Jamestown may not unilaterally determine that it is unnecessary to notify a resident of his or her breach and to

¹ Jamestown argues in the alternative that if the October 14, 2009 letter did not fulfill Jamestown's obligation to provide notice and an opportunity to cure, the lack of notice was harmless because Jamestown gave Comer notice of the eviction hearing and a proper opportunity to defend himself at the hearing. We disagree. The question of whether Comer received appropriate service of process for this case is irrelevant to whether Jamestown fulfilled its obligations under the Agreement. Similarly, the case Jamestown cites on this point, *In re T.W.*, 831 N.E.2d 1242, 1245 (Ind. Ct. App. 2005), is distinguishable because that case addressed a litigant's right to due process under the Fourteenth Amendment to the United States Constitution in the context of an action to terminate parental rights. The current case concerns contract law.

set an expiration date for the Agreement because the resident, in Jamestown's opinion, will not be able to cure the breach to Jamestown's approval.

Jamestown further argues that it was entitled to evict Comer because in a February 16, 2009 letter to Comer, Jamestown informed Comer that it would no longer accept late payments from him and that any subsequent failure to timely pay carrying charges would result in Jamestown immediately filing suit to evict him. We disagree. A party to a contract may not make unilateral changes to a contract. *Stelko Elec., Inc. v. Taylor Community Schools Building Corp.*, 826 N.E.2d 152, 159 (Ind. Ct. App. 2005). While parties may voluntarily enter into and modify contracts, such modifications, which are also contracts, require all the elements of a contract. *Id.*

In this case, the February 16, 2009 letter from Jamestown to Comer effectively purported to eliminate Jamestown's obligations under the Agreement to: (1) notify Comer of any future breach of the Agreement for late payment of carrying charges; (2) set an expiration date for the Agreement, after which Jamestown could seek possession of the dwelling; and (3) allow Comer an opportunity to attempt to cure his breach prior to the expiration date. There is no evidence that Comer agreed to Jamestown's purported changes to the Agreement, and there was no consideration for Jamestown's changes. Thus, the February 16, 2009 letter was an invalid unilateral modification of the contract and had no effect on the parties' obligations.

Finally, Jamestown contends that Comer cannot cite Jamestown's breach of the Agreement as a defense against Comer's breach of the Agreement because Comer

committed a prior material breach, and in so doing released Jamestown from its obligation to provide notice to Comer of his breach and an opportunity to cure.

A party first guilty of a material breach of contract may not maintain an action against the other party or seek to enforce the contract against the other party should that party subsequently breach the contract. *Henthorne v. Legacy Healthcare, Inc.*, 764 N.E.2d 751, 758 (Ind. Ct. App. 2002) (quotation omitted). This court has long held that whether a party has committed a material breach is a question of fact, the resolution of which is dependent on several factors. *Frazier v. Mellowitz*, 804 N.E.2d 796, 802 (Ind. Ct. App. 2004). When reviewing a ruling on a motion to correct errors, we may neither reweigh the evidence nor judge the credibility of the witnesses. *Petersen v. Burton*, 871 N.E.2d 1025, 1028 (Ind. Ct. App. 2007). We have also stated that the following factors are to be considered in determining whether a party's failure to perform is material:

- (1) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;
- (2) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;
- (3) The extent to which the party failing to perform has already partly performed or made preparations for performance;
- (4) The greater or lesser hardship on the party failing to perform in terminating the contract;
- (5) The willful, negligent or innocent behavior of the party failing to perform; and
- (6) The greater or lesser uncertainty that the party failing to perform will perform the remainder of the contract.

Frazier, 804 N.E.2d at 802.

In this case, applying the factors listed above, Comer repeatedly paid his carrying charges late, but Jamestown received the substantial benefit it could have reasonably anticipated from the Agreement because Comer always paid the carrying charges within several days or weeks, with all required late fees. It is unclear whether Comer's belated payment of carrying charges, with late fees, is adequate compensation for Comer's lack of complete performance, but there is no evidence of the harm Jamestown sustained from Comer's belated payments. Furthermore, although Comer paid the carrying charges late, he ultimately performed or partly performed his obligations under the Agreement by paying the charges and associated late fees. Next, considering the balance of hardships, once again there is no evidence in the record as to the harm caused to Jamestown by Comer's late payment of carrying charges. By contrast, Comer would experience great hardship if the Agreement was terminated because he would have to find another place to live. Turning to the intent behind Comer's behavior, failing to timely pay carrying charges despite being reminded of that obligation on several occasions is hardly innocent behavior, yet there is no evidence that his conduct was willful. At worst, Comer's behavior was negligent. Finally, it is unclear whether Comer will adequately perform the remainder of the contract, but Comer timely paid his carrying charges more often than not and when he was late he always paid the charges with the required late fees.

We conclude that the trial court, as the finder of fact, could have determined that Comer's breach of the Agreement was not material, and that Comer's failure to timely pay the carrying charges did not excuse Jamestown from giving Comer notice of his breach and an opportunity to cure.

CONCLUSION

For these reasons, we affirm the trial court's grant of Comer's motion to correct errors.

Affirmed.

DARDEN, J., and VAIDIK, J., concur.