FIRST DIVISION
December 5, 2011

No. 1-11-0906

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SOUTH MICHIGAN LOFTS, LLC, an Illinois Limited Liability Company,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	No. 07 M1 600514
GENE CORDON,	)	
Defendant-Appellee,	)	
and	)	
EMMA ESTOQUE-CORDON,	)	Honorable Patrick J. Sherlock,
Defendant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Karnezis concurred with the judgment.

ORDER

HELD: The judgment of the circuit court affirmed, where: (1) defendant demonstrated sufficient diligence in support of his motion to open judgment previously obtained by confession; and (2) confessed judgment was properly vacated where it was based upon promissory note that plaintiff was not entitled to enforce.

¶ 1 Plaintiff, South Michigan Lofts, LLC, an Illinois limited liability company (South Michigan), filed the instant lawsuit against defendant, Gene Cordon, seeking to enforce a promissory note defendant provided as part of a failed real estate transaction. South Michigan confessed judgment

against defendant on the note, and defendant subsequently moved to open the confessed judgement pursuant to Supreme Court Rule 276 (eff. July 1, 1982). The circuit court granted defendant's motion and ultimately vacated the original judgment after finding the note unenforceable. South Michigan now appeals from both of these decisions. For the following reasons we affirm.

¶ 2 I. BACKGROUND

¶ 3 Many of the relevant facts underlying this appeal are set forth in a prior order of this court. *South Michigan Avenue Lofts, LLC v. Cordon*, No. 1-10-1334 (2011) (unpublished order pursuant to Supreme Court Rule 23). Therefore, we will discuss only those facts relevant to the resolution of the present appeal.

¶ 4 In October of 2004, defendant and his then-wife, Emma Estoque-Cordon, entered into a real estate contract with South Michigan for the purchase of a condominium unit in a development then under construction on the near south-side of Chicago. The contract price for the unit was $350,500.00, with a tentative closing date set for April of 2006. While the pre-printed contract also called for defendant and his wife to provide a 10% earnest money deposit, a handwritten amendment to that requirement indicated that defendant and his wife would timely make a 5% cash deposit, with the "Balance of 10% per P/N attached." Attached to the contract were, among other documents, a promissory note. The note was signed by defendant and his wife and obligated them to pay South Michigan $17,525.00 "at closing *** as additional earnest money."

¶ 5 Defendant paid South Michigan a total deposit of $17,525.00 as earnest money, and South Michigan subsequently informed defendant and his wife that a closing date for their purchase of the condominium unit had been set for May of 2006. However, this closing date was extended by agreement to June 7, 2006, after defendant notified South Michigan that he and his wife were in the process of divorcing and he would now need to proceed with an individual purchase of the

condominium unit. After defendant's request for a further extension was denied, and he failed to appear at the June 7 closing date, South Michigan sent out a notice of default.

¶ 6 In that notice, South Michigan informed defendant that his failure to cure the default within a 20-day period contained in the contract would result in the cancellation of the contract and the retention of the earnest money as contract damages. However, the letter also indicated the closing date would be extended if defendant would agree to a *per diem* charge. Defendant did not agree with this arrangement, and a third closing date was scheduled within the 20-day curative period, on June 27, 2006. Defendant appeared at the closing prepared to purchase the unit in his own name, but refused to close after South Michigan was unwilling to remove a *per diem* charge from the closing documents.

¶ 7 The parties, thereafter, initiated a small flurry of litigation. In April of 2007, South Michigan filed the instant action against defendant and his former wife seeking to enforce the $17,525.00 promissory note pursuant to a *cognovit* clause contained therein allowing South Michigan to confess judgment on the note "without process." That same month, South Michigan also filed a separate declaratory judgment action in the circuit court *(South Michigan Avenue Lofts, LLC, v. Gene Cordon*, Cause No. 07 CH 09789) seeking a declaration that defendant and his wife were in default on the real estate contract and that South Michigan was, therefore, entitled to the earnest money actually deposited as damages. Finally, defendant filed his own breach of contract action against South Michigan. However, when defendant became aware of South Michigan's declaratory judgment action, he dismissed his own case and filed a counterclaim in South Michigan's suit. Defendant sought a declaration that it was actually South Michigan that had breached the contract by imposing a *per diem* charge uncalled for by the real estate contract, he was, therefore, justified in refusing to close on the unit, and he was, further, entitled to the return of the earnest money

deposit.

¶ 8 The declaratory judgment action proceeded to a bench trial in February of 2010. After trial, the circuit court entered judgment against South Michigan on its complaint, entered judgment in favor of defendant on his counterclaim, and awarded defendant all of the earnest money then held in escrow. The circuit court found that the real estate transaction failed to close because of South Michigan's attempt to impose unauthorized *per diem* charges. South Michigan appealed, and this court affirmed after finding South Michigan's "imposition of a *per diem* was invalid and unauthorized *** [and its] refusal to close unless Mr. Cordon paid the unauthorized *per diem* charge caused this deal to fail." *Cordon*, No. 1-10-1334, at 8-9.

¶ 9 While the declaratory judgment action was being litigated, the instant litigation also proceeded in the circuit court. Specifically, a final confessed judgment was entered against defendant and his former wife in this matter on May 1, 2007, in the amount of the note with statutory post-judgment interest to accrue until the judgment was fully paid. Defendant's ex-wife soon filed a motion to open that confessed judgment, and that motion was granted in August of 2007. In December of 2007, an agreed order was entered indicating "[e]xecution on the judgment that is the subject of these proceedings may proceed against Defendant Gene Cordon (but not at present against Emma Estoque)."[1]

¶ 10 Citation proceedings, thereafter, proceeded against defendant throughout 2008 and 2009, with funds from a number of defendant's bank accounts being deposited with the clerk of the circuit court. However, it does appear that the judge in the instant matter was also made aware of the pending declaratory judgment action, as at least one order entered below continued the instant

[1] Defendant's ex-wife subsequently settled with South Michigan and she is no longer a party to this suit.

litigation for a future hearing for "status on Chancery case and other matters."

¶ 11 Ultimately, defendant filed a motion to open the confessed judgment in March of 2010. That motion, supported by defendant's affidavit, asserted defendant was diligent by informing the circuit court in this case that he had been pursuing his "counterclaim and defenses" in the declaratory judgment case. He also asserted he had a valid defense to the judgment entered in the instant case; *i.e.*, it was South Michigan that defaulted on the sales contract and it was, therefore, not entitled to enforce the promissory note. That argument was supported by citation to the favorable ruling defendant had obtained from the circuit court in the declaratory judgment case.

¶ 12 The circuit court granted defendant's motion to open the confessed judgment in July of 2010. A bench trial was, thereafter, held in this matter in February of 2011, at which the parties submitted a number of stipulated documents and defendant provided testimony. At the conclusion of that trial, the circuit court found: "it appears in this case that the breach in the Court's opinion was as the result of the failure of the plaintiff to close on the date it was scheduled and not the defendant's failure, therefore, I'm going to vacate the judgment on the confession and enter judgment for the defense." Plaintiff now appeals.

¶ 13 II. ANALYSIS

¶ 14 On appeal, South Michigan contends the circuit court erred by: (1) granting defendant's motion to open the confessed judgment where defendant was not diligent in bringing that motion; and (2) vacating the confessed judgment against defendant on the grounds of a contract defense, where the judgment was based upon the promissory note and that note was independent of the real estate contract. We disagree with both of these arguments.

¶ 15 A. Motion to Open Judgment

¶ 16 We first address South Michigan's challenge to the circuit court's order granting defendant's

motion to open the confessed judgment.

¶ 17 Section 2-1301(c) of the Code of Civil Procedure provides: "any person for a debt bona fide due may confess judgment by himself or herself or attorney duly authorized, without process." 735 ILCS 5/2-1301(c) (West 2008). In turn, the procedure for opening a judgment by confession is set forth in Supreme Court Rule 276 (eff. July 1, 1982), which provides in part:

> "A motion to open a judgment by confession shall be supported by affidavit in the manner provided by Rule 191 for summary judgments, and shall be accompanied by a verified answer which defendant proposes to file. If the motion and affidavit disclose a *prima facie* defense on the merits to the whole or a part of the plaintiff's claim, the court shall set the motion for hearing. The plaintiff may file counter affidavits. If, at the hearing upon the motion, it appears that the defendant has a defense on the merits to the whole or a part of the plaintiff's claim and that he has been diligent in presenting his motion to open the judgment, the court shall sustain the motion either as to the whole of the judgment or as to any part thereof as to which a good defense has been shown, and the case shall thereafter proceed to trial upon the complaint, answer, and any further pleadings which are required or permitted."

¶ 18 On appeal, South Michigan challenges the order opening the confessed judgment on the grounds defendant was not diligent in presenting his motion where the original judgment was entered in May of 2007 and the motion to open that judgment was not filed until March of 2010. South Michigan contends defendant "submitted no affidavit supporting any claim to diligence, nor did his motion proffer any excuse or justification for the almost-3-year delay." It then cites to a number of cases finding a lack of sufficient diligence where a motion to open was filed within less time from the entry of the confessed judgment. See *e.g.*, *Interstate Bank of Oak Forest v. Sluis*, 79

Ill. App. 3d 1039, 1045 (1979) (2 years); *Lyons Brothers Lumber & Fuel Co. v. Shepherd*, 81 Ill. App. 3d 213, 217 (1980) (10 months); *Windsor Development Co., Inc. v. Segall*, 10 Ill. App. 3d 322, 324-25 (1973) (2 months); *Abrams v. Milliron*, 85 Ill. App. 3d 1027, 1028-29 (1980) (8 months). We disagree.

¶ 19 First, we reject South Michigan's contention that defendant "submitted no affidavit supporting any claim to diligence, nor did his motion proffer any excuse or justification for the almost-3-year delay." Defendant's affidavit included the assertion that he "filed a counterclaim in the Declaratory Judgment action, and on February 24, 2010, the Judge ruled in my favor both on the Declaratory Judgment action and on my counterclaim for the return of my earnest money." Further, defendant's motion itself contained the following assertions with respect to his diligence in this case: "[w]hen Gene Cordon learned of the Declaratory Judgment action, he filed his Answer and Counterclaim before Judge Arnold in the Chancery case, and proceeded with his breach of contract action in that Court. *** This Court was advised that Mr. Condon was pursuing his counterclaim and defenses in the ancillary case filed in the Chancery Division, and has refused to take any actions until the outcome of that matter was determined." While there is no evidence in the record that explicitly corroborates the assertion that the circuit court in this matter "refused" to take any action pending the outcome of the chancery case, we do note an order entered below continuing this case for "status on Chancery case and other matters." Moreover, defendant filed his motion to open the confessed judgment within a *month* of the favorable ruling he received in the chancery case. Finally, South Michigan has never challenged defendant's assertions in this regard, either in the circuit court or on appeal.

¶ 20 Second, we reject the contention that the circuit court's determination of defendant's diligence should be guided simply by measuring the amount of time that passes between when a

confessed judgment is originally entered and when a motion to open that judgment is ultimately filed. It has long been recognized that, a motion to open a judgment by confession "is addressed to the sound discretion of the court and its order will only be reversed for an abuse of such discretion." *Bayles v. Bennett*, 22 Ill. App. 3d 144, 145 (1974). It is also well-established that such a motion "is to be considered under liberal equitable principles, with the right to present a defense considered an exercise of the conscience of the court." *First National Bank of Elgin v. Achilli*, 14 Ill. App. 3d 1, 4 (1973). While the cases cited by South Michigan found delays in filing a motion to open a confessed judgment of much less than three years to be evidence of a lack of diligence, none of those cases addressed a fact pattern similar to the one at issue here. While defendant's motion may have been filed nearly three years after the original judgment was entered, defendant was certainly very active in his overall defense of South Michigan's claims and in his attempt to counter South Michigan's attempts to retain any earnest money from the failed real estate transaction.

¶ 21 In sum, we reject South Michigan's contention that the circuit court abused its discretion in finding that, under the specific facts of this case, defendant was diligent in presenting his motion to open the judgment by confession.

¶ 22 B. Vacation of Judgment by Confession

¶ 23 We next address South Michigan's assertion that the promissory note was independent of the real estate contract, and, therefore, no possible contract-based defense could impact its right to obtain and enforce a judgment against defendant on the basis of that note. We again disagree.

¶ 24 Our resolution of this issue requires us to interpret both the promissory note and the real estate contract. A "promissory note is a contract" (11 Am. Jur. 2d Bills and Notes § 2), and as such our interpretation of both documents are questions of law and subject to *de novo* review (*Salce v. Saracco*, 409 Ill. App. 3d 977, 981 (2011)). Furthermore, it is well established that "[t]he primary

goal of contract interpretation is to give effect to the intent of the parties. [Citation.] In determining the intent of the parties, a court must consider the document as a whole and not focus on isolated portions of the document. [Citation.] If the language of a contract is clear and unambiguous, the intent of the parties must be determined solely from the language of the contract itself, which should be given its plain and ordinary meaning, and the contract should be enforced as written. [Citation.]" *Id*.

¶ 25 Moreover, the general rule is, " 'in the absence of evidence of a contrary intention, where two or more instruments are executed by the same contracting parties in the course of the same transaction, the instruments will be considered together and construed with reference to one another because they are, in the eyes of the law, one contract.' " *Peters & Fulk Realtors, Inc. v. Shah*, 140 Ill. App. 3d 301, 305 (1986) (quoting *Tepfer v. Deerfield Savings and Loan Ass'n*, 118 Ill. App. 3d 77, 80 (1983)). " 'Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect * * *.' " *Tepfer*, 118 Ill. App. 3d at 80 (quoting 17 Am. Jur .2d Contracts § 264). Finally an "instrument will be most strongly construed against the party who prepared it." *Bankier v. First Federal Savings & Loan Ass'n of Champaign*, 225 Ill. App. 3d 864, 870 (1992).

¶ 26 Here, South Michigan contends the note was independent of the real estate contract because: (1) the note *does not* contain any "express reference" to the contract; (2) the note *does* contain a provision indicating "[t]his document represents the entire understanding between Gene and Emma Estoque-Gordon and South Michigan Avenue Lofts, LLC relative to the payment of additional earnest money;" (3) the note contains a promise to pay $17,525.00 as "additional earnest money," rather than as the "earnest money deposit" referred to in the contract; and (4) the funds payable

pursuant to the note were to be paid to South Michigan itself, rather than the "segregated escrow account" provided for in the contract for other earnest money funds. It, therefore, contends it was entitled to enforce the promissory note at any time after the closing date, whether or not either party defaulted on the sales contract and whether or not the sale actually closed on that date.

¶ 27 We disagree. Here, there is no dispute the note in question was executed on the same day as the sales contract. These documents were executed by the same parties and relate to the same real estate transaction. While the note contains a provision stating it "represents the entire understanding" with respect to "the payment of additional earnest money" for the purchase of South Michigan's condominium unit, exactly what "earnest money" the promissory note was *additional to* is only made clear when the real estate contract is considered. Indeed, the very need for a promissory note to serve as "additional earnest money" is only provided for in that contract. As such, we find the note and the contract clearly constitute a single transaction, and they must, therefore, be construed together.

¶ 28 When we actually read these documents together, they provide the proper basis for the resolution of this suit. It is clear the 10% cash deposit called for in the preprinted contract and, thereafter, referred to as "Earnest Money," was altered by the handwritten amendment to include a 5% cash deposit with the "Balance of 10% per P/N attached." As such, whenever the contract, thereafter referred to "Earnest Money," it necessarily referred to both the cash deposit and the promissory note.

¶ 29 Moreover, the contract itself also contained provisions for how any defaults would be treated. It specifically provided in the case of the defendant's default, South Michigan would be entitled to "retain the Earnest Money **** as liquidated damages." In turn, should South Michigan default or otherwise be unable to perform under the contract, the contract would be terminated and "the Earnest

Money shall be returned forthwith to the Buyer."

¶ 30 In light of the amendment to the definition of just what the term "Earnest Money" consisted of, we find these contract provisions regarding default also apply to South Michigan's right to enforce the promissory note as "additional earnest money" in the case of defendant's default, as well as defendant's obligation to pay on the promissory note when it is South Michigan that fails to perform under the contract. Indeed, this determination is supported by the fact that "a promissory note may be affected by a separate writing. The writing, although physically separate from the note, is logically viewed as an integral part of the total transaction, and is legally treated as a part of the contract between the parties. Consequently, where a separate document is executed as part of a promissory note transaction, ' "a stipulation or condition inserted in the one is an effective part of the contract of the parties, although not found in the other, provided there is no necessary inconsistency." ' " *Shah*, 140 Ill. App. 3d at 305-06 (quoting *Tepfer*, 118 Ill. App. 3d at 81).

¶ 31 In sum, we find the promissory note and the contract are to be interpreted together, and when so construed, they indicate South Michigan is not entitled to enforce the promissory note where it is the party that is in default. As noted above, this court has already found South Michigan's "imposition of a *per diem* was invalid and unauthorized *** [and its] refusal to close unless Mr. Cordon paid the unauthorized *per diem* charge caused this deal to fail." *Cordon*, No. 1-10-1334, at 8-9. Thus, South Michigan was not entitled to enforce the promissory note at issue here, and the circuit court properly vacated the confessed judgment in this case.

¶ 32 III. CONCLUSION

¶ 33 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 34 Affirmed.