

No. 1-10-1334

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).

FOURTH DIVISION
April 7, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SOUTH MICHIGAN AVENUE LOFTS, LLC.,)	Appeal from the
an Illinois limited liability company,)	Circuit Court of
)	Cook County.
Plaintiff-Appellant,)	
)	
v.)	No. 07 CH 09789
)	
GENE CORDON,)	The Honorable
)	Nancy Arnold,
Defendant-Appellee.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Salone concurred in the judgment.

ORDER

HELD: Sales agreement between seller of residential real estate and buyer did not authorize imposition of *per diem* charge where buyer defaulted on contract but would have closed during permitted 20-day cure period absent the unauthorized charge.

In this case, we consider a failed real estate deal where both the buyer and seller sought a declaratory judgment that the opposing party had defaulted on the sale agreement. In October 2004, Gene Cordon and his then-wife Emma Estoque-Cordon (the Buyers) entered into a real

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estate contract (the Contract) with South Michigan Avenue Lofts, LLC (the Seller) for the purchase of a condominium located at 1305–1321 South Michigan Avenue in Chicago. At that time, the Buyers paid the Seller \$17,525.00 as earnest money. The closing date was tentatively set for April 2006 because the contract was for new construction.

In early May 2006, the Seller notified the Buyers that it had set a closing date of May 25. On May 10, the Buyers' attorney notified the Seller that Mr. Cordon and Ms. Estoque-Cordon were divorcing and desired to cancel the contract. The Seller denied this request. The Buyers then made a request for a new closing date because Mr. Cordon was going to be out of town with family on May 25. The Seller agreed to this request, and a new closing date was set for June 7. On that day, the Buyers' attorney sent a letter to the Seller indicating that Mr. Cordon wanted to close on the property individually but would need an extension of time for the bank to amend the loan documents. Mr. Cordon, testifying as an adverse witness during the Seller's case, stated that he decided to purchase the property, even though his ex-wife "backed out," after being advised that it was not possible to back out without forfeiting the earnest money.

On June 8, 2006, the Seller responded by letter, notifying Mr. Cordon that the Buyers were in default pursuant to paragraph 8 of the Contract. Paragraph 8 of the Contract provides:

“8. DEFAULTS: A failure to appear at the time and place stated in the notice of the Closing Date *** shall be a default. In the event of Buyer's default, Seller shall provide written notice to Buyer and Buyer shall be granted twenty (20) days from the receipt of such notice to cure the default. In the event Buyer fails to cure the default within the time specified herein, Seller shall retain the Earnest Money *** as liquidated

damages. *** Retention of the Earnest Money as provided above *** shall be Seller's sole and exclusive remedy hereunder.

In the event of Seller's default under the terms of this Contract, return of all Buyer's funds shall be Buyer's sole and exclusive remedy hereunder."

The letter also stated that the Seller would "agree to extend the Closing in consideration" of Mr. Cordon agreeing to pay a *per diem* of \$81.76 beginning on June 7 through the ultimate closing date. The Seller requested Mr. Cordon sign the letter indicating his agreement to the *per diem*, which Mr. Cordon refused to sign.

While paragraph 8 of the Contract includes no reference to a *per diem*, paragraph 11 of the Contract, entitled "Construction," provides:

"(d) When notified by Seller that the Premises is Substantially Completed, Buyer shall have the right to inspect the Premises with an authorized representative of Seller for the purpose of agreeing on a punch list of items not yet completed, which items shall be completed by Seller as soon as practicable following the closing. Buyer's refusal to close under this Contract because of Buyer's failure to make such inspection prior to closing or Seller's failure to complete all items on the punch list prior to the Closing Date shall constitute a default by Buyer hereunder. Seller reserves the right to charge Buyer for any of its carrying costs, in the form of a *per diem* charge as determined by Seller, in the event Buyer does not complete the closing of this transaction on the scheduled Closing Date."

The Seller did not reference paragraph 11 in its notice of default letter to Mr. Cordon.

The Seller subsequently notified Mr. Cordon that the third closing date was set for June 27, 2006. On that date, Mr. Cordon and his attorney appeared for the closing. They met with the closing agent from Mercury Title Company, but no representatives of the Seller were present. The Seller had prepared all the documents in Mr. Cordon's name. Mr. Cordon testified that he was qualified to purchase the property, was approved for a loan, and brought "cashier certified funds" with him to the closing. He stated that he wanted to close and was ready, willing, and able to close.

After signing multiple documents, but before tendering any money to the closing agent, Mr. Cordon and his attorney noticed a *per diem* charge of \$1,716.96 on the Seller's closing statement. This figure represented the Seller's calculation of a *per diem* of \$81.76 charged for 21 days beginning June 7 through June 27. Mr. Cordon testified that the *per diem* was an unjustified charge because the Seller charged him for an extra day beyond the closing date (21 days instead of 20 days), and the charge was excessive because he had been ready to close since approximately June 15.¹ Mr. Cordon's attorney phoned the Seller's attorney to discuss the *per diem*. The Seller refused to remove the *per diem* charge and demanded Mr. Cordon pay the charge or walk out of the closing. Mr. Cordon left the closing without tendering any money to the closing agent.

¹ Mr. Cordon did not inform the Seller that he was ready to close on June 15 but believed that his attorney might have done so.

In April 2007, the Seller sued the Buyers² seeking a declaratory judgment that their failure to close on June 27, 2006 constituted a breach and default of the contract, and that the Seller was entitled to the \$17,525 in earnest money. In October 2007, Mr. Cordon counterclaimed for a declaratory judgment that the Seller breached the contract by failing to close and imposing a *per diem* charge not agreed on by the parties, and that he was entitled to the earnest money.

A one-day bench trial was held on February 24, 2010. Prior to trial, the parties stipulated to joint exhibits, which consisted primarily of the Contract and the various written correspondences between the two parties. Mr. Cordon was the only witness called. During its closing argument, the Seller argued that the final sentence of paragraph 11(d) justified its imposition of a *per diem*: “Seller reserves the right to charge Buyer for any of its carrying costs, in the form of a per diem charge as determined by Seller, in the event Buyer does not complete the closing of this transaction on the scheduled Closing Date.”

At the close of the Seller’s case, the circuit court granted Mr. Cordon’s motion for judgment in his favor. The court concluded that the Seller had not proved that Mr. Cordon failed to cure his default of June 7 because Mr. Cordon appeared at the June 27 closing “ready, willing, and able” to close on the contract, thus curing any default. The court relied on Mr. Cordon’s uncontradicted testimony that his loan had been approved, and that he had a certified check for the amount needed to close. The court further found that the deal failed to close because of the

² Emma Estoque-Cordon is no longer a party to this action. On September 1, 2009, the circuit court granted the Seller’s motion for voluntary dismissal of Emma Estoque-Cordon.

Seller's attempt to impose additional charges not authorized under the Contract and not agreed to separately by Mr. Cordon. In its written order, the circuit court: (1) entered judgment against the Seller on its complaint; (2) entered judgment in favor of Mr. Cordon on his counterclaim; and (3) awarded Mr. Cordon all of the cash escrow funds, as well as the court costs on his counterclaim. On April 7, 2010, the Seller's motion to reconsider was denied. This appeal followed.

The Seller first contends that the trial court's interpretation and application of the Contract was in error. The interpretation of a contract is a question of law and is subject to *de novo* review. *Gallagher v. Lenart*, 226 Ill. 2d 208, 219 (2007). The cardinal rule in interpreting a contract is to give effect to the parties' intent, which is to be discerned from the contract language. *Virginia Surety Co., Inc. v. Northern Ins. Co. of New York*, 224 Ill. 2d 550, 556 (2007). In determining the intent of the parties, a court must consider the contract document as a whole and not focus on isolated portions of the document. *Gallagher*, 226 Ill. 2d at 233. If the contract language is unambiguous, it should be given its plain and ordinary meaning. *Virginia Surety*, 224 Ill. 2d at 556.

The Seller argues that paragraph 11(d) unambiguously permits a *per diem* late charge in any instance where Mr. Cordon failed to close on the closing date but ultimately closes at a later date. In support of this proposition, the Seller relies on an isolated fragment of paragraph 11(d): "Seller reserves the right to charge Buyer for any of its carrying costs, in the form of a per diem charge as determined by Seller, in the event Buyer does not complete the closing of this transaction on the scheduled Closing Date." While the Seller contends that this isolated fragment of paragraph 11(d) was intended to apply to the remainder of the contract, the contract language

itself does not support this position. When this sentence is read in conjunction with the remainder of paragraph 11(d) and the rest of the contract, it is clear that the parties did not intend for the *per diem* to apply in every instance where Mr. Cordon failed to close.

Paragraph 11, entitled “Construction,” contains 8 subsections. Broadly speaking, this paragraph sets forth the obligations and rights of each party during the construction phase. Section 11(d) relates to Mr. Cordon’s right to inspect the premises for the purpose of agreeing on a punch list of items to be completed by the Seller as soon as practicable after closing. In relation to this inspection, section 11(d) provides that Mr. Cordon would be in default for refusing to close based on either: (1) his failure to make such an inspection prior to closing; or (2) the Seller’s failure to complete all the items on the punch list prior to closing. If Mr. Cordon did not close on the scheduled closing date for either of these reasons, the Seller reserved the right to charge Mr. Cordon a *per diem* for any of its carrying costs until the ultimate closing date.

Paragraph 8, entitled “Defaults,” sets forth specific remedies for either party in the event of the other’s default. If Mr. Cordon defaulted, he was entitled 20 days from the receipt of a notice of default to cure the default. If Mr. Cordon failed to cure the default within that time period, the Seller was entitled to retain the earnest money as liquidated damages. In the event the Seller defaulted, Mr. Cordon was entitled to the return of all funds paid to the Seller. These remedies are both labeled as the “sole and exclusive remedies” pursuant to the contract.

Both paragraph 8 and paragraph 11 refer to specific circumstances and specific remedies, *i.e.* paragraph 8 provides for liquidated damages in the event of a default for failing to appear at the closing, and paragraph 11 provides for the imposition of a *per diem* charge in the event of a

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delayed closing due to inspections or punch list items. There is no mention of a *per diem* charge in paragraph 8 and no indication that the *per diem* charge in paragraph 11 was intended to apply to the remainder of the Contract. Based on these two paragraphs, it is clear that the parties intended the *per diem* charge to only apply if Mr. Cordon refused to close on the basis of a punch list failure. There is no dispute in this case related to punch list items or inspection. Rather, the dispute originated when Mr. Cordon failed to appear for the closing set on June 7, defaulted on the Contract, and did not ultimately close on June 27. This scenario falls under paragraph 8. By imposing a *per diem* under these circumstances, the Seller acted beyond its rights and contrary to Mr. Cordon's rights, as set out in paragraph 8 of the Contract. Accordingly, the Seller's imposition of a *per diem* was invalid and unauthorized pursuant to the Contract.

The Seller next contends that Mr. Cordon breached the Contract by failing to cure his default within the 20 day period set forth in paragraph 8. The evidence indicates that Mr. Cordon was prepared to close on June 27. He testified that he attended the closing with his attorney, his loan had previously been approved by the bank, and he brought a certified check to the closing. Mr. Cordon also testified that he was in the process of signing the closing documents when he discovered the *per diem* charge imposed by the Seller. After Mr. Cordon's attorney called the Seller to question the charge, the Seller instructed Mr. Cordon to sign the papers or walk out on the deal because it would not renegotiate the charge. As previously discussed, this *per diem* charge was unauthorized pursuant to the Contract. Further, Mr. Cordon did not acquiesce to the *per diem* outlined in the Seller's June 8 notice of default letter. It would be patently unreasonable to construe the Contract as requiring Mr. Cordon to tender the purchase price to the

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Seller despite this unauthorized *per diem*. But for the Seller's imposition of this unauthorized *per diem* charge, the evidence indicates that Mr. Cordon was prepared to cure his default on June 27, within the 20 day period permitted to do so under paragraph 8. Put another way, the Seller's refusal to close unless Mr. Cordon paid the unauthorized *per diem* charge caused this deal to fail.

Therefore, the earnest money shall be returned to Mr. Cordon.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court.

Affirmed.