

No. 1-10-0499

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

CHICAGO REGIONAL PORT DISTRICT, now)	Appeal from the Circuit Court of
known as ILLINOIS INTERNATIONAL PORT)	
DISTRICT, an Illinois municipal corporation,)	
)	
Plaintiff-Appellant,)	
)	No. 07 M1 729103
v. _____)	
)	
DOCKSIDE DEVELOPMENT CORPORATION,)	Honorable Joan E. Powell,
an Illinois business corporation,)	
)	
Defendant-Appellee.)	

Justice Murphy delivered the judgment of the court.
Justices Neville and Steele concurred in the judgment.

ORDER

HELD: Where prior adjudication involved same parties and similar subject matter, but includes ongoing breach, *res judicata* does not bar argument, but where assignment is not complete and parties present evidence of disputed intent, summary judgment on release language was improper.

Plaintiff, Chicago Regional Port District, now known as Illinois International Port District, and defendant, Dockside Development Corporation, entered into two 65-year lease

No. 1-10-0499

agreements for two properties, parcels “A” and “B,” at Lake Calumet Harbor on June 3, 1965 (collectively referred to as the “lease”). The lease requires defendant to excavate and construct a slip on the property to the depth of 27 feet with plaintiff assuming maintenance responsibilities of the slip after completion. The slip was never excavated to a uniform depth of 27 feet and plaintiff ultimately filed the instant forcible entry and detainer action seeking possession for defendant’s breach of the terms of the lease. Plaintiff moved for summary judgment based on findings of this court in two prior appeals concerning plaintiff’s maintenance obligations.

Dockside Development Corp. v. Chicago Regional Port District, No. 1-00-3625 (2002)

(unpublished order under Supreme Court Rule 23) (*Dockside I*), *Dockside Development Corp. v.*

Chicago Regional Port District, No. 1-03-3474 (2005) (unpublished order under Supreme Court

Rule 23) (*Dockside II*). Defendant presented evidence that it was released of this duty in

documents relating to a 1984 assignment of portions of the lease and the trial court agreed that

defendant was released of its duty to excavate the slip to 27 feet. For the following reasons we

reverse.

I. BACKGROUND

The instant matter concerns plaintiff’s November 8, 2007, action sounding in forcible entry and detainer against defendant. Plaintiff alleged that defendant failed to meet its obligation as provided in the lease to excavate and complete Slip No. 2 to a required depth of 27 feet.

Plaintiff sought judgment for possession of the premises. The trial court granted defendant’s motion for summary judgment, finding that it had been released from the lease requirements.

The Lease, Operation of the Slip and Disputes Over Dredging and Maintenance

No. 1-10-0499

The parties agree that the lease calls for defendant to construct, improve and operate the parcels as public terminal and port facilities. Specifically, the facilities constructed were for the purpose of handling reshipment to and from vessels, barges, rail cars, trucks and pipelines, and for the storing processing and distributing products of all sorts, excluding bulk liquids and grains. To accomplish this, defendant was required to construct a warehouse of at least 100,000 square feet on parcel A and to dredge the slip of parcel B to 1,500 feet in length, 400 feet in width and a depth of 27 feet.

This lease was contingent upon defendant's completion of the slip, but provided that defendant would be reimbursed its expenses for completing the work. Defendant was authorized to retain 75% of all wharfage and dockage charges collected from operating the parcels up to \$750,000 for the dredging and construction required. The lease further provided that following completion of the slip, plaintiff would be responsible for maintaining the slip at a level of 27 feet and for any necessary repair of the slip.

In consultation with plaintiff, defendant began work on the slip in 1969. The parties agree that the slip was never excavated and dredged to a depth of 27 feet, but the slip became operable and defendant began operating the slip in the summer of '69. The parties disputed what standard was to be utilized in measuring the depth of the slip over the next two years, but admit that the 27-foot requirement was not met. This court subsequently reached that same conclusion in *Dockside I*, and that order provides extensive detail concerning this issue.

1984 Assignment Documentation

The next event of note is the 1984 assignment of portions of the lease to Pinkert Steel

No. 1-10-0499

Company, Inc. Defendant approached plaintiff about selling the steel warehouse it constructed on the property and assigning portions of both parcels to Pinkert. During discovery on defendant's motion for summary judgment in the instant matter, documents evidencing plaintiff's consent to this transaction were obtained from plaintiff's files including two consent resolutions and one consent, all dated June 15, 1984. These documents formed the basis for defendant's argument that plaintiff released defendant from its duty to dredge the slip to 27 feet. The resolutions and consent are signed by the chairman and secretary of the board of directors. The minutes from the June 15, 1984, meeting of plaintiff's board of directors attest that the documents were authorized.

The two consent resolutions are nearly identical. The resolutions contain a number of recitals in the preamble including releases agreed to by defendant. Each resolution attaches and references a letter from defendant's counsel to counsel for plaintiff, Ms. Terrance Diamond, signed by defendant's counsel but not countersigned by Diamond. The letters, dated May 31, 1984, and June 13, 1984, are substantially similar and reference discussions between the two attorneys concerning the assignment. Of relevance is paragraph "4." that states "The Port District will agree to release Dockside from any claims it may have against Dockside existing prior to December 31, 1983,¹ for the alleged breach of any of the terms and conditions set forth in the several Leases between the Port District, Dockside and Emesco.²"

The consent states that plaintiff "for and in consideration of the specific terms and

¹The date provided in the June 13, 1984, letter is January 1, 1983.

²Defendant's related stevedore operating company.

No. 1-10-0499

conditions contained in the letter dated June 13, 1984,” consents to the conveyance and assignment by defendant. Further, the consent “releases Transferor [defendant] from all of the terms, covenants or obligations contained in the said Leases to be kept, observed and performed with respect to the property set forth on Exhibit A attached hereto.” The aforementioned June 13, 1984, letter from defendant’s counsel to Diamond was attached to the consent.

Previous Litigation on Plaintiff’s Duty of Maintenance

In 1989 defendant advised plaintiff that certain maintenance was required on the slip. In response, plaintiff acknowledged its obligations but indicated it did not have funding to comply with any maintenance requests. In 1995, defendant again advised plaintiff that maintenance was required and the slip was not at a depth of 27 feet. This time plaintiff responded in writing that it had no obligation to dredge the slip or perform maintenance because defendant had never completed its obligation to excavate the slip to 27 feet in the first instance. In 1997, defendant filed an action seeking a declaration that plaintiff was obligated to undertake the necessary dredging and maintenance of the slip resulting in two circuit court orders and *Dockside I* and *Dockside II*.

As noted above, the prior orders of this court extensively considered the provisions of the lease and the initial actions of the parties. Both appeals involved the question of whether plaintiff’s duties to maintain the slip were subject to the condition precedent of defendant’s completing excavation of the slip to 27 feet in depth. As the documentation from the 1984 transaction was not discovered until the instant matter, this court did not consider those issues.

In *Dockside I*, this court detailed defendant’s actions in improving the slip and submitting

No. 1-10-0499

reimbursement request for \$749,908.38 for its work. It also detailed the dispute between the parties concerning the proper measuring standard and the primary measurement of 23-26 feet throughout the slip in 1970. Despite the dispute, defendant recovered its fees in total from wharfage and dockage fees over the next few years.

The next dispute of record occurred in the 1980s when defendant requested that plaintiff dredge the slip and repair the dock face wall. The executive director acknowledged plaintiff's maintenance obligations, but advised defendant it had no funds to complete work. In 1995, defendant again advised plaintiff that the slip was not at required depth and maintenance was necessary. In response, plaintiff claimed that it had no duty until defendant completed its obligation and defendant subsequently sought declaratory relief. *Dockside I*, No. 1-00-3625, slip op. at 2-13.

On appeal, this court affirmed the trial court's dismissal of defendant's motion for summary judgment and reversed the grant of plaintiff's motion for summary judgment. This court found that the record clearly demonstrated that defendant had not met its duty of excavating the slip to 27 feet. Equally clear from the language of the lease was that plaintiff's duty was specifically conditioned upon defendant's having completed excavation. *Dockside I*, No. 1-00-3625, slip op. at 21-22. However, this court found triable issues of fact related to the grant of plaintiff's motion for summary judgment, particularly defendant's allegation that plaintiff waived strict compliance with the lease. *Dockside I*, No. 1-00-3625, slip op. at 30.

On remand, the trial court found that plaintiff waived its right to insist upon strict timeliness by defendant, but it did not waive the right to demand completion as a condition

No. 1-10-0499

precedent to its maintenance obligations. On appeal of that decision, this court affirmed the trial court's findings. Citing paragraph 6.2 of the lease, this court found that even if plaintiff's various actions and inactions were considered waiver, at most it was a waiver to timely demand defendant meet its obligations and, pursuant to the lease, defendant's obligation continued.

Dockside II, No. 1-03-3474, slip op. at 11-13. Without terms specifically waiving the right to performance, the language of paragraph 6.2 compelled the finding that the trial court properly found in favor of plaintiff. *Dockside II*, No. 1-03-3474, slip op. at 13.

Plaintiff's Complaint and the Parties' Motions for Summary Judgment

Following *Dockside II*, plaintiff sent notice to defendant that it would no longer tolerate defendant's delay in meeting its obligation to excavate the slip to 27 feet. The parties attempted, but failed to negotiate a settlement. Defendant reported to plaintiff that it had begun work toward meeting its obligation, including hiring surveying company and seeking permits for the work. However, no work was completed. After negotiations failed, plaintiff filed the instant verified complaint in forcible entry and detainer.

Plaintiff moved for summary judgment based on the doctrine of *res judicata*. Plaintiff argued that there was identity of parties and identity of cause of action between the instant action and *Dockside I & II*. Because this court affirmed the finding that defendant had failed to meet its obligations in determining that plaintiff's duty of maintenance relied on that condition precedent, plaintiff argued that the trial court must grant summary judgment and find that defendant was in default on the lease.

Plaintiff provided affidavits of several experts who testified to the permit requirements

No. 1-10-0499

and process, economic advantages, and lease requirements for the construction and use of the 27-foot depth of the slip. In addition, in response to defendant's motion for summary judgment, plaintiff provided the affidavit of Terrance Diamond who testified that the two letters addressed to her were never signed by her, nor was she authorized to do so. Diamond averred that the release was solely limited to the portions of the parcels assigned and did not apply to the portions maintained by defendant, including the slip and defendant's obligation to dredge the slip to 27 feet.

In defendant's motion for summary judgment it argued that the release identified in the documents surrounding the 1984 assignment of the lease required judgment in its favor. As noted above, the consent signed by plaintiff included the following language: "[plaintiff] releases [defendant] from all of the terms, covenants or obligations contained in the said Leases to be kept, observed and performed with respect to the property set forth on Exhibit A attached hereto." Defendant highlighted that it also released plaintiff from any claims against it, including claims for wharfage and dockage collected on the cargoes handled by the assignee.

Defendant provided affidavits of several witnesses who averred that the 27-foot requirement was no longer a material condition. The witnesses provided that such a depth was only necessary for the largest vessels and it was no longer economically viable for such vessels to travel so far. John B. Schlossberg, III, vice president for defendant, also testified that he was aware of the alleged release, but was not in possession of the documentation other than the June 13, 1984, letter until discovery in the instant matter. Schlossberg further asserted that during negotiations in 2005 and 2006 to settle this case, representatives of plaintiff stated it had no

No. 1-10-0499

interest in seeing the slip dredged to 27 feet as it would be a waste of money.

Argument and Order of the Trial Court

The trial court heard argument on both motions. First, the trial court determined that defendant had produced sufficient affidavits to support a finding that there was a question of material fact whether there was a material breach of the lease allowing plaintiff possession of the property. Accordingly, the trial court denied plaintiff's motion for summary judgment.

The parties then presented argument on defendant's motion for summary judgment. The trial court opined that the matter was not barred by *res judicata* as the prior proceedings narrowly dealt only with the determination of whether defendant's obligation was a condition precedent to plaintiff's duties under the lease. The court conceded that summary judgment was a drastic remedy and that the case was close. However, despite limiting language in some of the documents presented, it held that there was enough language concerning releases by both parties that, taken together, the documents evidenced a release by plaintiff of defendant's duty to excavate the slip to 27 feet. This appeal followed.

II. ANALYSIS

Summary judgment may be granted when the pleadings, depositions, admissions and affidavits on file demonstrate no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2006). Where parties file cross-motions for summary judgment, they concede the absence of a genuine issue of material fact and invite the resolution of the matter by the court as a matter of law. *Chicago Hospital Risk Pooling Program v. Illinois State Medical Inter-Insurance Exchange*, 397 Ill. App. 3d 512, 523

No. 1-10-0499

(2010) (hereinafter *CHRPP*). We review an order granting summary judgment *de novo*. *CHRPP*, 397 Ill. App. 3d at 523. While we also review the evidence in a light most favorable to the nonmovant, we cannot ignore evidence unfavorable to the nonmovant and may sustain the trial court on any basis called for in the record. *Ruane v. Amore*, 287 Ill. App. 3d 465, 474 (1997).

1. *Res Judicata*

We begin by first by rejecting plaintiff's argument that the doctrine of *res judicata* bars consideration of defendant's obligation. Under the doctrine of *res judicata*, a final judgment on the merits entered by a court with proper jurisdiction acts as an absolute bar to subsequent claims between the parties regarding the same claim, demand, or cause of action. *Mount Mansfield Insurance Group v. American International Group, Inc.*, 372 Ill. App. 3d 388, 392 (2007). The doctrine of *res judicata* is based on the public policy interests of judicial economy and finality of litigation. *Papers Unlimited v. Park*, 253 Ill. App. 3d 150, 153 (1993). The doctrine applies to not only claims actually made and decided in the first action, but also to matters that might have been raised and determined or that could have been offered to sustain or defeat a claim in the first cause of action. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008). The essential elements of the equitable doctrine of *res judicata* are: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of parties or their privies; and (3) an identity of causes of action. *Mount Mansfield*, 372 Ill. App. 3d at 392.

As summarized by our supreme court, the Restatement provides six exceptions to the application of the doctrine of *res judicata*:

“However, *res judicata* does not apply to bar an independent claim of part of the same cause of action if (1) the parties have agreed in terms or in effect that plaintiff may split his claim or the defendant has acquiesced therein; (2) the court in the first action expressly reserves the plaintiff’s right to maintain the second action; (3) the plaintiff was unable to obtain relief on his claim because of a restriction of the subject-matter jurisdiction of the court in the first action; (4) the judgment in the first action was plainly inconsistent with the equitable implementation of a statutory scheme; (5) the case involves a continuing or recurrent wrong; or (6) it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason.”

Airtite v. DPR Limited Partnership, 265 Ill. App. 3d 214, 219 (1994).

There was a final judgment in the prior cause of action and an identity of parties between the instant action and the prior proceedings. However, there is not an identity of cause of action. The *Dockside II* court was abundantly clear that it found that defendant’s failure to meet its obligation was an ongoing breach of the lease. However, as addressed by defendant and the trial court, that finding was made in determining the separate question of whether there was a condition precedent to plaintiff’s maintenance obligations. Evidence of the release was not of record in that case or considered by this court. While plaintiff correctly argues that defendant could have raised the issue of the release, there is evidence of record in this case that defendant did not fully learn of the extent of the release or the existence of documents until this case. Furthermore, as explicitly stated by the *Dockside II* court there was an ongoing breach of the

No. 1-10-0499

lease - a continuing or recurrent wrong that merits exclusion from the application of *res judicata* even if there were an identity of cause of action.

2. Defendant's Motion for Summary Judgment

The trial court determined that there was no material issue of fact and granted defendant's motion for summary judgment based on the documentation associated with the 1984 assignment of portions of the lease to Pinkert. We review the existence and terms of a release under the tenets of contract law. *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 614 (2007). Releases are construed strictly against the benefitting party and where the terms are clearly and explicitly written, construction of the release is a question of law. Where the terms of the release are general, the intention of the parties may be discerned from the surrounding circumstances but specific recitals in the document control. *Janowiak v. Tiesi*, 402 Ill. App. 3d 997, 1014 (2010).

Defendant argues that summary judgment was properly granted based on the four contemporaneous documents that constituted the consent and assignment of a portion of the parcels to Pinkert Steel. Defendant asserts that the release language in the consent and incorporated letter from defendant's attorney to Diamond supports the trial court's conclusion that "all of these things taken together, I find as a matter of law that the motion for summary judgment is granted in favor of Dockside." Defendant contends that it is shameful that plaintiff attempts to limit the scope of the assignment to the portion assigned to Pinkert as the release clearly notes claims under "any of the leases" were released. We disagree.

By the very words of the trial court in the rendering of its decision, there is not such

No. 1-10-0499

clarity from the documents to support a grant of summary judgment. As the court addressed, there is limiting language in the documents that “could just refer to the Pinkert deal. But there also is enough language in the resolutions that refers beyond the Pinkert Steel operation. . .”

There also is language limiting any release to alleged breaches existing prior to January 1, 1984. The language is not so clear to definitively state as a matter of law that defendant was released from its duty to construct the slip.

Therefore, the intent of the parties must be considered from the documents as well as the surrounding circumstances. While a 25 year-old recollection by Diamond regarding the letters concerning the assignment does not carry conclusive weight as defendant argues, it is relevant to the intent of the parties. The parties were certainly aware of the claim when the assignment was granted and courts have allowed general language to control in such situations. *Janowiak*, 402 Ill. App. 3d at 1014. However, that rule also requires the parties to have contemplated the actual claim. *Janowiak*, 402 Ill. App. 3d at 1014.

Ostensibly, these are questions of fact in this case. Several factors lead us to find that questions remain. The assignment is not for the entirety of the parcels and it is a question if the parties contemplated full release of all obligations. Further, the release specifically limits its terms to claims existing prior to December 31, 1983, and January 1, 1984. In *Dockside II* this court found that defendant’s failure to meet its obligation of excavating to 27 feet and paragraph 6.2 of the lease compelled a finding that there was no waiver absent specific terms and the breach was ongoing. Therefore, there is a question of fact whether the release affected the ongoing breach. Subsequent actions by both parties in demanding undertaking of these lease obligations

No. 1-10-0499

argue against a finding that they intended such a release of either party's duties. The lack of concise and specific language and the surrounding circumstances require further examination and the trial court erred in granting summary judgment based on the documents presented.

3. Plaintiff's Motion for Summary Judgment

Plaintiff also argues that the trial court erred in denying its motion for summary judgment. Plaintiff argues that the evidence is undisputed that defendant never completed its obligation to dredge the slip to 27 feet. Plaintiff contends that the trial court erred in accepting defendant's claim that the 27 foot requirement was immaterial and impeded plaintiff's legislative mandate to make its facilities an international port and part of the St. Lawrence Seaway. Plaintiff responds to defendant's argument that this issue is not before this court by noting that an exception exists to the rule that denial of summary judgment is not a final and appealable order where the parties file opposing motions and the trial court grants one and not the other. *Chavda v. Wolak*, 188 Ill. 2d 394, 403 (1999). While defendant is correct that these were not cross-motions concerning the same issues that typically trigger this exception, the trial court heard argument and decided the motions at the same hearing and the issues asserted in both motions are similar.

However, as in *Chavda*, after reviewing the record, we agree with the trial court that genuine issues of material fact exist and plaintiff's motion for summary judgment was properly denied. As noted by the trial court, for plaintiff's motion to succeed it had to show there was no question of fact concerning a material breach to break the lease. It is interesting as plaintiff argues that defendant requested plaintiff dredge the slip to 27 feet, but the fact remains it

No. 1-10-0499

presented affidavits to demonstrate that, while the lease required dredging the slip to 27 feet, it was a question that the requirement was material in the present day. With 45 years having lapsed since the signing of the lease and the evidence presented by defendant, precluded summary judgment in favor of plaintiff.

III. CONCLUSION

For the foregoing reasons, the trial court's grant of summary judgment to defendant is reversed and the denial of plaintiff's motion for summary judgment is affirmed.

Reversed in part, affirmed in part. Remanded for further proceedings.