

No. 2—10—0560
Order filed April 8, 2011

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
SECOND DISTRICT

THE VILLAGE OF ROCKTON, ILLINOIS,)	Appeal from the Circuit Court of Winnebago County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 09—MR—427
)	
ROCK ENERGY COOPERATIVE, f/k/a Rock County Electrical Cooperative Association,)	Honorable J. Edward Prochaska,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: The trial court properly dismissed plaintiff's complaint for the specific performance of a sales contract; because the contract provided that the essential term of price would be determined not merely by the property's fair market value but by its fair market value as ascertained by the parties' future negotiations, the contract was not definite enough to be subject to specific performance.

Plaintiff, the Village of Rockton, brought suit against defendant, Rock Energy Cooperative, f/k/a Rock County Electrical Cooperative Association, seeking specific performance of a memorandum of understanding (MOU) executed by the parties. The trial court dismissed plaintiff's complaint with prejudice pursuant to section 2—615 of the Code of Civil Procedure (735 ILCS

5/2—615 (West 2008)), finding that the MOU was unenforceable because it lacked a sufficiently definite price provision. Plaintiff now appeals. For the reasons that follow, we affirm.

BACKGROUND

Plaintiff alleged the following in its complaint. In 2005, plaintiff and defendant entered into the MOU, pursuant to which plaintiff was granted the option to purchase certain utility assets that defendant intended to acquire from a third party. In consideration for the option to purchase the assets, plaintiff agreed to forbear on condemnation of the assets and to not interfere with defendant's acquisition of the assets from the third party. The MOU provided the following regarding the purchase price of the assets:

“Option; Price - After the conditions in Section 5(b) are satisfied (the ‘**Option Date**’), RCEC [defendant] agrees to sell the local utility assets to Rockton [plaintiff] at a purchase price determined by good faith, arms-length negotiation to ascertain the fair market value of the local utility assets[,] taking into consideration the future business and growth prospects of the local utility operations. It is anticipated that, subject to the feasibility analysis set forth in Section 4 above the minimum price for the acquisition will be ten million dollars.”

Despite plaintiff's repeated requests for cooperation, defendant refused to engage in good-faith negotiations to ascertain the fair market value of the utility assets. In February 2008, defendant provided plaintiff with a letter stating that defendant had no intention of honoring the MOU.

Plaintiff's complaint consisted of two counts. The first count was labeled as a count for declaratory relief, and the second count was labeled as a count for specific performance. Both counts, however, sought an order from the trial court directing defendant to participate in negotiations and complete the sale of the utility assets.

Defendant filed a motion to dismiss the complaint, arguing, among other things, that the MOU lacked a sufficiently definite price provision, rendering it unenforceable and not subject to specific performance. Following arguments, the trial court agreed and dismissed the complaint with prejudice. Plaintiff brought this timely appeal.

ANALYSIS

On appeal, plaintiff argues that the trial court erred in finding that the price provision of the MOU was so indefinite that it rendered the MOU unenforceable. “A section 2—615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face.” *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 160-61 (2009). We accept as true the well-pleaded facts and reasonable inferences in the complaint and construe the allegations in the light most favorable to the plaintiff. *Tedrick*, 235 Ill. 2d at 161. “Given these standards, a cause of action should not be dismissed, pursuant to a section 2—615 motion, unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief.” *Tedrick*, 235 Ill. 2d at 161. Our standard of review is *de novo*. *Tedrick*, 235 Ill. 2d at 161.

To be enforceable, a contract’s terms and provisions must allow a court to ascertain what the parties have agreed to do. *Crestview Builders, Inc. v. The Noggle Family Ltd. Partnership*, 352 Ill. App. 3d 1182, 1185 (2004). “Price is an essential element of every contract for the transfer of property and must be sufficiently definite or capable of being ascertained from the parties’ contract.” *Crestview*, 352 Ill. App. 3d at 1185. “[W]here a contract specifies that the price is to be measured by the ‘fair market value,’ ‘reasonable value’ or ‘current market value’ of the services or the property involved, courts have generally held that the price is sufficiently certain in order to have an enforceable obligation.” *Miller v. Bloomberg*, 26 Ill. App. 3d 18, 19-20 (1975). A contract is

unenforceable, however, if any essential term is left to future negotiations. *Hintz v. Lazarus*, 58 Ill. App. 3d 64, 67 (1978).

Plaintiff contends that the price provision of the MOU is sufficiently definite because it provides that the sale price is to be the fair market value of the utility assets. Although the price provision does reference fair market value, the provision, taken in its entirety, makes clear that the parties intended to engage in future negotiations to reach an agreed-upon price, and not to rely upon an objective evaluation of the fair market value of the utility assets. The price provision specifically states that the sale price is to be “determined by *good faith, arms-length negotiation* to ascertain the fair market value of the local utility assets[,] *taking into consideration the future business and growth prospects of the local utility operations.*” (Emphases added.) The provision specifically requires the sale price to be determined by negotiations of the parties and mandates that the negotiations take into consideration the future business and growth prospects of the local utility operations. If, as plaintiff contends, the parties intended the sale price to be the commonly understood and objective fair market value, then they could have simply stated as much. *Universal Scrap Metals, Inc. v. J. Sandman & Sons, Inc.*, 337 Ill. App. 3d 501, 506 (2003) (“Had the parties intended to expressly base their selling price on a third-party offer, they could have provided so in the agreement.”). Rather, they chose to require future negotiations and to include specific considerations, which might or might not be included in the commonly understood and objective fair market value. To read the price provision as simply providing for the sale of the utility assets at the fair market value set by an objective third party would be to read out the provision’s requirements that the parties engage in negotiations and take into consideration certain factors. We may not read out those terms. *Universal*, 337 Ill. App. 3d at 506 (contract provision that provided plaintiff with

the right of first refusal “ ‘under mutually agreed upon conditions’ ” could not be read to provide that the right could be exercised on the terms of a third-party offer, because to do so would read out the contract language of “ ‘under mutually agreed upon conditions’ ”). Because the price provision makes clear that the parties were to engage in future negotiations to reach a sales price, it is not sufficiently definite to allow enforcement of the MOU. *Hintz*, 58 Ill. App. 3d at 67 (where the rental price under a contract was left to future negotiations, the contract was not sufficiently definite to be enforceable and could not be specifically enforced). Accordingly, the trial court did not err in determining that plaintiff could not prove a set of facts entitling it to specific performance of the contract.

Plaintiff relies heavily on *Miller*, in which this court held that a contract providing the plaintiffs with the option to purchase property for the “ ‘then prevailing market price’ ” was sufficiently definite to be enforceable. *Miller*, 26 Ill. App. 3d at 20. The provision in *Miller* is readily distinguishable from the price provision here, as the provision in *Miller* unequivocally provided that the purchase price was to be, without conditions, the “ ‘then prevailing market price.’ ” In contrast, the price provision in the present case references not an objective fair market value, but one determined following negotiations by the parties and after taking into consideration specified factors.

Plaintiff also contends that the price provision cannot be subject to the negotiations of the parties because, if it were, plaintiff would be at the mercy of defendant’s willingness to participate in negotiations. While that might be true, it does not alter the fact that the law requires a contract to be sufficiently definite to be enforceable, and contracts that leave essential terms to future

negotiations are, as a matter of law, insufficiently definite to be enforceable. *Hintz*, 58 Ill. App. 3d at 67.

In sum, the trial court was correct in dismissing plaintiff's complaint for specific performance, because the MOU's price provision was not sufficiently definite, rendering the MOU unenforceable.

CONCLUSION

For the reasons stated, the judgment of the circuit court of Winnebago County is affirmed.

Affirmed.