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No. 3-10-0688

Order filed June 29, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

MIDLAND PLAZA, LLC, an Illinois)	Appeal from the Circuit Court
Limited Liability Company,)	of the 14th Judicial Circuit,
)	Henry County, Illinois
Plaintiff and)	
Counterdefendant-Appellee,)	
)	
v.)	
)	
LOUIS T. LITTLE,)	No. 08-CH-3
)	
Defendant, Counterplaintiff, and)	
Third-Party Plaintiff-Appellant,)	
)	
(The Estate of Robert S. Cohen,)	Honorable
)	Charles H. Stengel,
Third-Party Defendant).)	Judge, Presiding.

PRESIDING JUSTICE CARTER delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice McDade dissented in the judgment.

ORDER

Held: Where initial option to purchase in original lease agreement was clear and unambiguous, and 2001 amendment, which reinstated initial option to purchase, was also clear and unambiguous, the trial court properly granted summary judgment in favor of option holder and specifically enforced initial option to purchase.

Plaintiff, Midland Plaza, brought suit against defendant, Louis T. Little, seeking specific performance of an option to purchase certain real property. Little filed a counterclaim against Midland. The option to purchase at issue was contained in a lease agreement, which had been entered into in 1970 and had been amended several times. Midland filed a motion for partial summary judgment as to the option to purchase. After a hearing, the trial court granted partial summary judgment for Midland on its first amended complaint for specific performance and on count IV of Little's second amended counterclaim. Little brings this interlocutory appeal. We affirm the trial court's ruling.

FACTS

Little was the owner of the real property in question and leased the property to Midland or Midland's predecessors pursuant to a series of lease documents and amendments. Little owned one half of the membership interest in Midland. Robert Cohen formerly owned the other half of Midland. Cohen passed away in June of 2009, and his estate was substituted as a party in this case.

The purchase option at issue was created in a lease agreement for the property entered into in 1970 (the 1970 lease) between Little and Midland's predecessor. Paragraph 8 of the 1970 lease provided, in pertinent part, as follows:

“After January 1, 1976, the Lessee shall have the sole and exclusive option to purchase the above-described real estate, including Lessor's fee and leasehold interest, at any time during the remainder of the term of this Lease, and during any extensions thereof, for the cash amount hereinafter designated:

	<u>If Purchase Option</u>	<u>Purchase Price</u>
	<u>Is Exercised</u>	<u>Shall Be</u>

Prior to October 1, 1978.	\$301,600.00
Between October 1, 1978, and October 1, 1979.	\$320,450.00
Between October 1, 1979, and October 1, 1980.	\$339,300.00
Between October 1, 1980, and October 1, 1981.	\$358,150.00
After October 1, 1981.	\$377,000.00

Notice of the exercise of such purchase option shall be given in writing to Lessor at least forty (40) days before the intended closing date, and in such event, Lessor at his expense shall within twenty (20) days thereafter furnish Lessee a preliminary title report of Chicago Title and Trust Co. in the amount of the purchase price showing merchantable title in Lessor, and Lessee shall have twenty (20) days thereafter to report title objections. Such objections shall be cured by Lessor within twenty (20) days after the reporting of such objections, and if such is not done, Lessee may at its sole option (1) complete the transaction and deduct from the sale proceeds the cost of curing such defects, (2) refuse to complete the purchase and continue the Lease, or (3) refuse to complete the purchase and terminate the existing Lease. Closing of said transaction shall occur within forty-five (45) days after the preliminary title report is delivered to Lessee, at which time seller shall deliver his warranty deed conveying merchantable title free and clear of all encumbrances, except the mortgage or mortgages placed upon said premises by Lessee and current

taxes.”

In 1982, Little and Midland’s predecessor executed an agreement titled “Amendment No. 2 to Land Lease Agreement” (the 1982 second amendment). The agreement deleted certain real estate from the property that was covered by the 1970 lease. That property was put into a separate lease, titled “Land Lease Agreement” (the 1982 lease), that was executed on the same day as the 1982 second amendment. Thus, there were two operative leases between the parties: the 1970 lease, which initially covered all of the property, and the 1982 lease, which covered the property that was deleted from the 1970 lease in 1982 by the 1982 second amendment.

In 1991, Little and Midland’s predecessor executed an agreement titled “Amendment No. 3 to Land Lease Agreement” (the 1991 third amendment). Among other things, the 1991 third amendment added a parcel of property to that covered by the 1970 lease to include an outdoor storage area that was being used by one of the stores on the property.

In 1997, Little and Midland’s predecessor executed an agreement titled “Amendment No. 4 to Land Lease Agreement” (the 1997 fourth amendment). The 1997 fourth amendment expressly cancelled the option to purchase found in the 1970 lease and replaced it with a new option to purchase with a purchase price of \$600,000. Specifically, the 1997 fourth amendment stated, in pertinent part, as follows:

“The option granted to the Original Lessee in Paragraph 8 of the 1970 Lease is canceled. Lessor hereby grants the Successor Lessee the option, exercisable at any time subsequent to the expiration of the Additional Term and so long as the Successor Lessee leases the real property from Lessor, to purchase the real property that is the subject of the 1970 Lease, including any amendment thereto that may

change the real property that is the subject of the 1970 Lease. In the event the Successor Trustee exercises the purchase option, the purchase price will be Six Hundred Thousand Dollars (\$600,000). The manner of exercise and the procedure for closing in the event the purchase option is exercised shall be as specified in Paragraph 8 of the 1970 Lease.”

In the right margin of the 1997 fourth amendment, next to the above provision, was the following handwritten notation:

“Purchase option not to include additional 160,000 sq. ft. of land leased to Menards rent free.”

Little's handwritten initials appear next to that notation.

In 2001, the parties executed an agreement titled “Amendment No. 4 to Midland I Land Lease Agreement” (the 2001 fourth amendment). The stated purpose of the 2001 fourth amendment was to “amend the Land Lease Agreement to provide additional extension periods for the lease term.”

In the "RECITALS" portion of the 2001 fourth amendment, the parties set out a comprehensive list of all of the prior agreements and documents that related to the property. That list, however, did not include the 1997 fourth amendment or the new purchase option of \$600,000. Of relevance to this appeal, section 3 of the 2001 fourth amendment provided that:

“All other terms and conditions of the January 12, 1970 Land Lease Agreement, shall remain in full force and effect, including, but not limited to, the provisions relating to the Lessee’s option to purchase the Property for the price stated in paragraph 8 of the January 12, 1970 Land Lease Agreement.”

On the same date as the 2001 fourth amendment was executed, a document entitled “Amendment No. 1 to Midland II Land Lease Agreement,” was also executed by Little and Midland (the amendment to the 1982 lease). The amendment to the 1982 lease provided, in pertinent part, as follows:

“The parties hereby incorporate by reference paragraph 8 of the January 12, 1970 Land Lease Agreement by an[d] between LOUIS T. LITTLE as the Lessor and COMMERICAL NATIONAL BANK OF PEORIA as Trustee under the provisions of Trust Agreement No. 61-7249, as the Lessee, as though fully set forth in this Amendment. The parties include the Property subject to the February 1, 1982 Land Lease Agreement in the option to purchase granted in said paragraph 8 of the January 12, 1970 Land Lease Agreement, such that the Lessee under both Land Lease Agreements shall have the option to purchase all, but not less than all of the Property subject to both Land Lease Agreements for the price stated in the January 12, 1970 Land Lease Agreement.”

In October of 2007, Midland notified Little that it was exercising the purchase option for the price of \$377,000 per the terms of paragraph 8 of the Land Lease Agreement dated January 12, 1970, and the 2001 fourth amendment. Little refused to honor the option to purchase and repudiated that portion of the agreement.

In April of 2008, Midland filed its first amended complaint seeking to enforce the purchase option. Subsequently, Little filed his second amended counterclaim, count IV of which requested a declaratory judgment interpreting the purchase option.

In May of 2009, Little moved for summary judgment on Midland's first amended complaint.

After a hearing, the trial court denied the motion. In so doing, the trial court stated:

“After considering the arguments and reviewing the case law, as well as the contract here, I find that the price of \$377,000 under this purchase option agreement -- it says ‘after October 1st, 1981’ -- I find that [it] is unambiguous. It is fixed. It is the price. It is reaffirmed in 2001. So I don’t find any ambiguity in regards to the price here.”

In March of 2010, Midland filed a motion for partial summary judgment on its first amended complaint for specific performance and on count IV of Little’s second amended counterclaim regarding the purchase option. Following a hearing, the trial court granted Midland’s motion for partial summary judgment. In so doing, the trial court stated:

“I have considered the pleadings, the exhibits, and construing the evidence and material strictly against the movant, liberally in favor of the opponent to the motion, the October 2001 amendment, fourth amendment, states on page 2, paragraph 3, ‘All other terms and conditions of the January 12th, 1970, land lease agreement shall remain in full force and effect, including, but not limited to, the provisions relating to the lessee’s option to purchase the property for the price stated in paragraph 8 of the January 12th, 1970, land lease agreement.’

Going back to that 1970 agreement, page 7, the price stated would be -- after October 1st, 1981, it would be \$377,000. The agreement that’s the 2001 fourth amendment makes no mention of the 1997 fourth amendment price of \$600,000. It doesn’t even mention it.

I also note that the Midland II amendment [the Amendment to the 1982

Lease], page 2, states: ‘The parties include the property subject to the February 1st, 1982, land lease agreement in the option to purchase granted in said paragraph 8 of -- ‘of the January 12th, 1970, land lease agreement, such that the lessee under both land lease agreements shall have the option to purchase all, but not less than all, of the property subject to both land lease agreements for the price stated in the January 12th, 1970, land lease agreement.’

I think it’s pretty clear that the language in this amendment, that the purchase option is clear and unambiguous; therefore, I find that it must be enforced as written, so I’ll grant your motion for summary judgment in favor of Midland Plaza, L.L.C.”

Consistent with its oral ruling, the trial court entered a written order awarding partial summary judgment for Midland on its first amended complaint for specific performance and on count IV of Little’s second amended counterclaim regarding the purchase option. In the written order, the trial court specifically found that the purchase option in the 1970 lease and the 2001 fourth amendment were unambiguous and should be enforced as written. Based upon a stipulation between the parties, the trial court made a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. February 26, 2010) that there was no just reason to delay enforcement or appeal of its order granting summary judgment for Midland. Enforcement of the order, however was stayed pending appeal. Little subsequently appealed to challenge the trial court's ruling.

ANALYSIS

On appeal, Little argues that the trial court erred in granting summary judgment for Midland on its first amended complaint for specific performance and on count IV of Little’s second amended counterclaim regarding the purchase option. Little asserts first that no option to purchase can be

enforced in this case because the lease documents and the amendments, when construed together as a whole, are too conflicting and ambiguous to allow for an award of specific performance. Alternatively, Little asserts that the only option to purchase that can be enforced in this case is the one for \$600,000, which cannot be exercised at this time, but rather only at the expiration of the lease term. Midland disagrees with those assertions and argues that the trial court's grant of partial summary judgment in its favor was proper and should be affirmed.

The purpose of summary judgment is not to try a question of fact, but rather to determine if one exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008); *Adams*, 211 Ill. 2d at 43. In appeals from summary judgment rulings, the standard of review is *de novo*. *Adams*, 211 Ill. 2d at 43.

In the present case, the subsequent amendments to the 1970 lease agreement throughout the years constituted modifications of the contract between the parties. A modification of a contract is a change in one or more aspects of a contract that introduces new elements into the details of the contract or cancels some of them but leaves the general purpose and effect of the contract undisturbed. *Schwinder v. Austin Bank of Chicago*, 348 Ill. App. 3d 461, 468 (2004). Parties to a contract are generally free to modify the contract by mutual assent or agreement, as long as the modification does not violate law or public policy. *Schwinder*, 348 Ill. App. 3d at 468. “Under Illinois law, a valid modification of a contract must satisfy all the criteria essential for a valid original contract, including offer, acceptance, and consideration.” *Schwinder*, 348 Ill. App. 3d at 468. When

a modification is inconsistent with a term of a prior contract between the same parties, the modification is interpreted as including an agreement to rescind the inconsistent term in the prior contract. *Schwinder*, 348 Ill. App. 3d at 469. “The modified contract is regarded as creating a new single contract consisting of so many of the terms of the prior contract as the parties have not agreed to change, in addition to the new terms on which they have agreed.” *Schwinder*, 348 Ill. App. 3d at 469.

The question before this court in the instant case is very narrow. Little does not dispute that the 2001 fourth amendment was a valid modification. The only question before this court is the effect of the 2001 fourth amendment on the option to purchase and on the 1997 fourth amendment. To determine the effect of the 2001 fourth amendment, this court must apply the rules of contract interpretation. The interpretation of any contract, including a lease agreement, is a question of law and is subject to *de novo* review on appeal in accordance with the general rules applicable to contract interpretation. *Gallagher v. Lenart*, 226 Ill. 2d 208, 219 (2007); *NutraSweet Co. v. American National Bank & Trust Co. of Chicago*, 262 Ill. App. 3d 688, 694 (1994); *Schwinder*, 348 Ill. App. 3d at 469. The primary goal of contract interpretation is to give effect to the intent of the parties. *Virginia Surety Co. v. Northern Insurance 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; *Premier Title Co. v. Donahue*, 328 Ill. App. 3d 161, 164 (2002). 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 document itself, which should be given its plain and ordinary meaning, and the contract should be enforced as written. *Virginia Surety Co.*, 224 Ill. 2d at 556; *J.M. Beals Enterprises, Inc. v. Industrial Hard*

Chrome, Ltd., 194 Ill. App. 3d 744, 748 (1990); *Reaver v. Rubloff-Sterling, L.P.*, 303 Ill. App. 3d 578, 581 (1999). However, if the contract language is ambiguous, the meaning of the contract language must be ascertained through a consideration of extrinsic evidence. *Gallagher*, 226 Ill. 2d at 233.

In the present case, the terms of the 2001 fourth amendment, as they relate the option to purchase, are not ambiguous. The 2001 fourth amendment specifically adopts or reinstates the original terms as set forth in the 1970 lease agreement. Those terms also are not ambiguous. Pursuant to the 2001 fourth amendment, Midland had the option to purchase the entire parcel of property in question for \$377,000 at any time during the lease term or during the period of extensions. That conclusion is further corroborated when considered in light of the modification to the 1982 lease agreement, which was executed at the same time as the 2001 fourth amendment and which also reinstated the option to purchase terms that were set forth in the 1970 lease agreement. See *Gallagher*, 226 Ill. 2d at 233 ("instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction are regarded as one contract and will be construed together"); *Community State Bank of Galva v. Hartford Insurance Co.*, 187 Ill. App. 3d 110, 114 (1989) (instruments, which are executed for the same purpose and in the course of the same transaction, will generally be construed as a single instrument). The terms of the option to purchase contained in the 1970 lease agreement and reinstated in the 2001 fourth amendment are clear and unambiguous and must be enforced as written.

Little's assertions to the contrary are not persuasive. It is precisely because the 2001 fourth amendment and the 1997 fourth amendment are inconsistent that the law determines that the 2001 fourth amendment rescinded the inconsistent terms of the 1997 fourth amendment. See *Schwinder*,

348 Ill. App. 3d at 469. In addition, because the terms of the 2001 fourth amendment and the 1970 option to purchase are clear and unambiguous, the law inquires no further into the intent of the parties, and does not ask, as Little would have this court do, why the parties agreed to the particular terms in question. See *Virginia Surety Co.*, 224 Ill. 2d at 556; *J.M. Beals Enterprises, Inc.*, 194 Ill. App. 3d at 748; *Reaver*, 303 Ill. App. 3d at 581.

Having determined that the option to purchase provision contained in the 1970 lease agreement was valid, still effective, and enforceable, this court must still determine whether it was appropriate for the trial court to grant specific performance. In general, real property is unique and specific performance may be granted as a remedy for a violation of a contract for the purchase or the sale of real property because damages at law are generally not an adequate remedy. See *Bonde v. Weber*, 6 Ill. 2d 365, 380 (1955); *Schwinder*, 348 Ill. App. 3d at 476-77. A party seeking specific performance is held to a higher degree of specificity than demanded for other purposes and must show that there is a clear and precise understanding of the terms of the contract. See *Cinman v. Reliance Federal Savings & Loan Ass'n*, 155 Ill. App. 3d 417, 423-24 (1987). “Specific performance is a matter of sound judicial discretion controlled by established principles of equity and exercised upon a consideration of all the facts and circumstances of a particular case.” *Schwinder*, 348 Ill. App. 3d at 477. In determining whether specific performance is appropriate, a court should balance the equities between the parties and may refuse to grant specific performance where the remedy would cause a peculiar hardship or inequitable result. *Schwinder*, 348 Ill. App. 3d at 477.

In the present case, there does not appear to be an inequitable result which would prevent the trial court from granting specific performance. Nor does Little make any argument that such an inequity exists. Thus, this court must conclude that the trial court’s grant of specific performance

was appropriate and must affirm the trial court's grant of partial summary judgment for Midland on its first amended complaint for specific performance and on count IV of Little's second amended counterclaim.

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

Affirmed.

JUSTICE McDADE, dissenting:

I dissent from the majority's decision affirming the trial court's entry of summary judgment in favor of Midland. I believe summary judgment was inappropriate because the parties' lease/amendment provisions are ambiguous as to the parties' intent concerning the applicable price of the purchase option.

Little's primary contention on appeal is that the lease/amendment provisions are ambiguous. Specifically, Little calls our attention to two specific amendments: (1) the 1997 fourth amendment, and (2) the 2001 fourth amendment. Little argues that these two amendments are in direct conflict. I agree.

It is well established that in deciding a motion for summary judgment, the trial court may draw inferences from the undisputed facts. *Fritzsche v. LaPlante*, 399 Ill. App. 3d 507, 516 (2010). "However, where reasonable persons could draw divergent inferences from the undisputed facts, the issue should be decided by the trier of fact and the motion should be denied." *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 272 (1992). In light of the standard, the trial court does not have any discretion in deciding the matter. *Derby Meadows Utility Co. v. Inter-Continental Real Estate*, 202 Ill. App. 3d 345, 354 (1990). "In cases involving contracts, there is a disputed fact

precluding summary judgment when the material writing contains an ambiguity which requires admission of extrinsic evidence.” *Loyola Academy*, 146 Ill. 2d at 272.

Here, the 1997 fourth amendment expressly cancels the purchase option found in the original lease. Specifically, it states:

“The option granted to the Original Lessee in Paragraph 8 of the *** [original lease] is canceled.”

The 1997 fourth amendment then proceeds to provide Midland with a new purchase option, which can be exercised for the amount of \$600,000. Clearly, the parties intent, as expressed through the plain language of the 1997 fourth amendment, was: (1) to cancel the purchase option found in the original lease, and (2) create a new purchase option, governed by new terms and conditions, one of which includes a flat purchase price of \$600,000.

The 1997 fourth amendment, however, is in direct conflict with the explicit language of the 2001 fourth amendment, which provides that the purchase price stated in paragraph 8 of the original lease remains in full force and effect. Specifically, it states:

“All other terms and conditions of the [original lease], shall remain in full force and effect including, but not limited to, the provisions relating to the Lessee’s option to purchase the Property for the price stated in paragraph 8 of the [original lease].”

The 1997 fourth amendment and 2001 fourth amendment cannot be harmonized with each other. Counsel for Midland acknowledged this fact when making the following judicial admission¹

¹ Judicial admissions are “deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge.” *In re Estate of Rennick*, 181 Ill. 2d 395, 406 (1998).

before the trial court:

“THE COURT: Well, the one specific question that I have is it brings up the point where the option was canceled. So that’s –

MS. NAIR [counsel for Midland]: Absolutely.

THE COURT: Address that.

MS. NAIR: Yes. That there is – there is an apparent conflict between the 1997 fourth amendment and the 2001 fourth amendment.

*** Yes, it’s unfortunate that they did not use the word ‘reinstated’ rather than ‘in full force and effect,’ indeed.”

It is undisputed that the 1997 fourth amendment acted to cancel the purchase option found in the original lease. Midland insists, however, that the 2001 fourth amendment could “just as easily be defined as the ‘Last Amendment’ [and] *** constitutes the final and dispositive meeting of the minds between Midland and Little. This is pure conjecture. The fact that the parties may have intended to return to the purchase option found in the original lease is irrelevant without some affirmative evidence that the new purchase option created in the 1997 fourth amendment was no longer valid. There is none.² Instead, the stated purpose of the 2001 fourth amendment was to “amend the Land Lease Agreement to provide additional extension periods for the lease term.”

While the trial court was correct in noting that the 2001 fourth amendment unambiguously provides that the purchase price found in paragraph 8 of the original lease “*remain[s]*” in full force and effect, it ignored the fact that the 1997 fourth amendment unambiguously “*canceled*” the purchase option found in the original lease. (Emphasis added.) The amendments are in direct

² Again, the 2001 fourth amendment did not reference the 1997 fourth amendment at all.

conflict. Under the circumstances, the court lacked authority to enter summary judgment. When the contract term in question is ambiguous, a question of fact exists, which must be determined by the trier of fact, and summary judgment may not be granted. See *Loyola Academy*, 146 Ill. 2d at 272; *A. Epstein & Sons International, Inc. v. Epstein Uhen Architects, Inc.*, 2011 Ill. App. LEXIS 9; *William Blair & Co., L.L.C. v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 342 (2005).

We simply do not know what the parties intended the purchase price to be. Instead, we only know that the parties' intent cannot be discerned from the language used in the leases and amendments.³ Moreover, the record does not reveal any extrinsic evidence that resolves the genuine issue of material fact in dispute. Did the parties, when drafting the 2001 fourth amendment, simply forget to void the new purchase option found in 1997 fourth amendment? Did the parties, when drafting the 2001 fourth amendment, intend to renew the purchase option found in the original lease? Was the use of the language found in the 2001 fourth amendment stating that the purchase price found in paragraph 8 of the original lease remains in full force and effect simply an unintended drafting mistake? We are unable to answer these questions at this stage of the proceedings, but because they exist, I believe summary judgment was improper and the matter must be remanded for further proceedings.

³ I acknowledge that the amendment to the 1982 lease, which was signed in 2001, expressly references the existence of paragraph 8 of the original lease. This fact, however, does not resolve the issue in dispute as the mere referencing of paragraph 8 only acts to verify the existence of a direct conflict because it also, like the 2001 fourth amendment, does not address the existence or applicability of the 1997 fourth amendment.